

**Officers of Parliament: A Study in
Government Adaptation**

**A Thesis Submitted to the College of
Graduate Studies and Research
In Partial Fulfillment of the Requirements
For the Degree of Masters of Arts
In the Department of Political Studies
University of Saskatchewan
Saskatoon**

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Fall 2002

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Abstract

This thesis explores the concept of Officers of Parliament and their place in the much older concept of responsible government. It argues that the changing nature of responsible government allows a place for Officers of Parliament to assist Parliament in holding government accountable. Since Officers of Parliament act as a check on government, it is necessary for the Officers to be independent from government. This thesis argues that independence is one of the defining characteristics of the Officers. Finally, by examining the relationship of Officers of Parliament with both the Senate and the House of Commons it is possible to see how Officers of Parliament fit into the complex structure of parliamentary government. This examination illustrates how the Houses of Parliament relate to their Officers as well as to each other.

Acknowledgements

I am indebted to many for their involvement in this project. The support and encouragement of friends and family made the completion of this thesis possible. Particularly, I would like to thank Ian Burgess, Ryan Dollimore, Russ Isinger, Megan Murphy, Paul Kopas and Carrie Tait who, despite their busy schedules, offered help whenever it was needed.

I am grateful for assistance from the Office of the Auditor General, the Office of the Chief Electoral Officer, the Office of the Commissioner of Official Languages, the Office of the Information Commissioner and the Office of the Privacy Commissioner. Specifically, I would like to thank the following people:

Antonine Campbell, Office of the Auditor General
Anne Marie Smith, Office of the Auditor General
Genevieve Breton, Office of the Auditor General
Sheila Fraser, Auditor General of Canada
Gilbert Langelier, Office of the Commissioner of Official Languages
Dyane Adam, Commissioner of Official Languages of Canada
John Reid, Information Commissioner of Canada
Anne Goldsmith, Office of the Privacy Commissioner
Hedy Kirkby, Office of the Privacy Commissioner

The enthusiasm and sincerity of Georges Tsai and Nadia Ponce-Morales of the Canadian Centre for Management Development is also greatly appreciated.

I would like to express my gratitude to the Department of Political Studies at the University of Saskatchewan. Students of this department are fortunate to work with educators who are not only terrific professors and distinguished scholars but who are also wonderful people. I am honoured to call many of the faculty members friends. I would especially like to thank Professors Duff Spafford, D. C. Story, Joe Garcea, Peter Ferguson and Cris DeClercy for their contributions to this thesis and to my education throughout the years. I would like to extend a special thank you to Professor J.C. Courtney who introduced me to the topic of Officers of Parliament. His support and encouragement have been invaluable.

Finally, I would like to offer a heartfelt thank you to my supervisor Professor David Smith for his hard work, patience and guidance. Without his assistance this thesis would not have been possible.

Dedication

To my dad who first acquainted me with politics.

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Introduction

The Auditor General (1878), the Chief Electoral Officer (1920), the Commissioner of Official Languages (1969) and the Information and Privacy Commissioners (1982) are Canada's Officers of Parliament. According to Senator Michael Pitfield, Officers of Parliament are "the direct and immediate servant[s] of Parliament itself."¹ One way this is represented is by the reporting of these Officers directly to Parliament through the Speaker of the House of Commons, and in the case of the three commissioners, through the Speakers of the House of Commons and of the Senate. There is no single term that defines an Officer of Parliament; however, one of the most important criteria to an Officer of Parliament is independence. In order to be seen as Parliament's servants these Officers must have, and be perceived to have, a significant degree of independence from the government of the day. This independence is acquired through reporting and removal procedures, the guarantee of financial independence, tenure, and the Officer's general control over the operations of the office.

While there may be some confusion as to who is and who is not an Officer of Parliament, this thesis will deal only with the Auditor General, the Chief Electoral Officer, and the Commissioners of Language, Information and Privacy. Other "near officers," such as the Canadian Human Rights Commission and the Public Service Commission, will not be examined. Furthermore, Officers of Parliament should not be confused with the Clerk of either House, the Sergeant-At-Arms, the Parliamentary Counsel and the like. Senator Pitfield explains that these

¹ Canada, Senate, Debates 27 June 1990, 2199.

positions are known as “officers of the House,” but at the same time they are “the nominations of the government and serve Parliament.”²

Although Officers of Parliament play a central role in Canadian government, as a group these positions have largely gone unstudied. While some articles and a few books examine individual Officers, mainly the Auditor General, few of these sources attempt to discuss the contribution of Officers of Parliament as a collective to the Canadian parliamentary system. This contribution at its most basic level is to serve as a check on government accountability. The lack of scholarly attention to Officers of Parliament is surprising since in modern Canadian government and politics the general concern about the restraint of executive power grows in importance. For a demonstration of the truth of this assertion, one may turn to the debate over the position of the Ethics Counsellor who, as of June 2002, is not an Officer of Parliament.³

Despite the role Officers of Parliament play in holding the government accountable, these Officers are a contradiction to the very principle on which Canadian government is based. The foundation of the Canadian parliamentary system is responsible government, a theory that dictates that the executive is directly responsible to Parliament. It is through Parliament that government is to be held accountable and responsible to the people. By this description, there is no room for other agents of accountability. Officers of Parliament represent some of the changes that have occurred in the Canadian system of government and the way that

² Ibid.

³ For example see Andrew McIntosh, “Counsellor powerless in the eyes of critics,” National Post, 20 November 2000, A7; Joël-Denis Bellavance, “Liberals Defeat Their Own Policy,” National Post 14 February 2001, A1; Andrew McIntosh, “Guide to Chrétien’s 8-point reform plan,” National Post 24 May 2002, A7.

governments have chosen to adapt to these changes; however, an explanation for the place of Officers of Parliament in the Canadian system still needs to be provided.

Chapter One explores the difference between the theory of responsible government and its perception and application to the Canadian parliamentary system. The chapter argues that responsible government can no longer function according to a theory that dictates that the executive is directly responsible to Parliament. Rather, responsible government has come to mean, at least in colloquial usage, that the government is responsible to the people, not to Parliament. Due to the growth in government and the bureaucracy, members of Parliament and political parties are no longer seen as effective representatives of the people. As such, governments have been forced to implement other means to ensure that governments are both responsible and responsive. Officers of Parliament are one mechanism governments have used to adapt to the changing ideas and expectations of responsible government.

As government in Canada has evolved, the ideas associated with responsible government have changed. As a result, the government has been forced to respond to these changes by making itself more accountable to the Canadian people whose distrust of government is increasing. One way for the government to present itself as more dependable and trustworthy is to have itself evaluated by an independent body - in this case Officers of Parliament. Like Parliament itself, its Officers help ensure the accountability of government. The importance of Officers of Parliament is demonstrated by what members of Parliament have to say about them. Consider, for instance, the remark by Yvon Pinard, speaking from the Government side of the House: “[the Auditor General’s] office plays a role without which it would be difficult for us to assume our own responsibilities to the Canadian people. The Auditor General is one of the main protectors of public interest.” More relevant to

this thesis, he maintains that “the Office of the Auditor General plays a major role in the assurance of responsible government within a parliamentary democracy.”⁴

Chapter Two looks more closely at how Officers of Parliament operate. Its thesis is that the cardinal features of Officers of Parliament are independence and accountability. Perhaps the most important feature of these Officers is independence from the executive. It is this independence that guarantees their detachment from the executive and in turn assures the impartial evaluation of government. It is the objective investigation of government, as discussed in chapter one, that carves a place for Officers of Parliament in responsible government. Audits of government in the areas of financial management, electoral legislation, equality of the French and English languages, the access to government information and the protection of personal privacy help to guarantee the responsible nature of government.

The principle of accountability is equally important and should be interpreted in two ways. First, Officers of Parliament are not all-powerful. They are held accountable by Parliament, a fact that illustrates their detachment from the executive. Although it is argued that the executive controls Parliament, the intentional separation of Officers of Parliament from the executive is symbolic. It illustrates that there is a demand for Officers of Parliament to be independent from government. Although the independence of Officers of Parliament may only exist in theory, it is the attempt to remove the Officers from the reach of the executive that is important. Second, Officers of Parliament help make responsible government more accountable and responsible to the public. The accountability Officers of Parliament offer to government arises from the trust gained from the Officers' independence.

⁴ Canada, House of Commons, Debates 10 April 1981, 9160.

Chapter Three examines the operation of the Officers in their relationship to a bicameral Parliament. This is important because it explores the interaction between Parliament and its Officers. By examining the relationship between the House of Commons and Officers of Parliament and the Senate and Officers of Parliament, it is possible to see how these Officers fit into the complex structure of parliamentary government. This examination illustrates not only how the Houses of Parliament adapt to the activities of Officers of Parliament but also how the Houses of Parliament adapt to each other.

Officers of Parliament have been a largely ignored feature of responsible government in Canada. This thesis will show the central role Officers of Parliament play in responsible government, a role too long overlooked since it is these Officers who help governments be responsible. The significance of Officers of Parliament is revealed by the high opinion members of Parliament hold of them, as witness the following comment by an Opposition member of Parliament (Mr. C.A. Gauthier): "I have always considered that the Auditor General is above all political considerations or all governments. He has always seemed to me like the compass guiding the federal vessel, regardless of who is the captain."⁵

⁵ Canada, House of Commons, Debates 21 April 1970, 6117.

Chapter One: Responsible Government and Officers of Parliament

Canada's first Officer of Parliament, the Auditor General, was appointed in 1878¹. Since then, four other officers have been created: the Chief Electoral Officer (1920), the Commissioner of Official Languages (1969), and the Information and Privacy Commissioners (1982). The peculiar nature of these creatures of Parliament makes them difficult to categorize and has left them largely undefined.² Moreover, their characteristics and terms of office differ from one to the other. There is no base for a unified concept that will permit an explanation of their function, roles and responsibilities.

At their most basic, Officers of Parliament are seen to be a type of check on government, or at least a measure to enforce government accountability. The Auditor General, for example, holds government financially accountable. Through independent audits and examinations, the Auditor General provides what is perceived to be objective information and advice, and thus assurance to Parliament about the financial practices of government.³ The Information Commissioner and the Privacy Commissioner check the government's use of information. The former ensures the government's compliance with the *Access to Information Act* (R.S. 1985, c. A-1).

¹ See appendix A for a list of the terms of Officers of Parliament.

² See for example the Report of the Special Committee on the Modernization and Improvement of the Procedures of the House of Commons, 37th Parliament, 1st Session, <http://www.parl.gc.ca/infoComDoc/37/1/SMIP/Studies/Reports/SMIP-e.htm> (Retrieved 9 June, 2001), Section 42. This report lists the Officers named above, the Clerk of the House of Commons, the Parliamentary Librarian, and the "Ethics Counsellor with respect to the *Lobbyists Registration Act*" as Officers of Parliament. See also the Report of the Special Committee on Reform of the House of Commons (Ottawa: Minister of Supply and Services, 1985), 33. In addition to the Officers this thesis examines, this report includes the Human Rights Commissioner, the Parliamentary Librarian and the Associate Parliamentary Librarian as "House of Commons Officers."

³ Office of the Auditor General, "Our Mission" www.oag-bvg.gc.ca Retrieved 23 November 2001.

For instance, citizens denied information by the government have the right to complain to the Information Commissioner who is duty-bound to investigate the claim. The latter, the Privacy Commissioner, monitors the use of information in government files.

The Chief Electoral Officer and Commissioner of Official Languages provide a different sort of check on government. The Chief Electoral Officer oversees Canada's elections and assumes responsibility for their fair and democratic execution. The Commissioner of Official Languages monitors the use of Canada's official languages, French and English. This Officer checks government's language policy and makes certain that both French and English are respected in government, the federal public service and other areas that fall under the jurisdiction of the federal government.

The curious point about this diverse group is that they appear to contradict the concept on which Canadian parliamentary government is based, that is the executive dominance of the legislature. The most obvious contradiction is that since Officers of Parliament do not report through a minister it appears that they are able to sidestep the apparatus of responsible government. Thus, there is a tension between the theory of responsible government and Officers of Parliament. If the executive is responsible to the House of Commons, where then do unelected, appointed Officers, who may be removed in most instances by the House of Commons and the Senate, and who are expected to audit government, fit into a system of responsible government?

To answer this question it is necessary to examine what is responsible government. Examination of this principle will reveal that there is a difference between the theory and the practice of responsible government in Canada. As a

result, adaptations have been made to the theory of responsible government, and these, in turn, have shaped parliamentary government in Canada in a distinctive way.

Essentially, responsible government “makes the executive accountable to the House of Commons.”⁴ It is through accountability to the elected legislature that the government remains indirectly accountable to the people.⁵ One must remember that the powers in Canada’s Parliament are fused; contrary to language often heard in the media there is no separation of the executive from Parliament. Canada’s “system of government is not compartmentalized as between the government and Parliament. The political executive is composed of Members of Parliament and is therefore not separate from Parliament.”⁶ Eugene Forsey claimed that “in the classic theory, Parliament exists to transact public business: to legislate, to criticize the Government, to support or condemn the government as it thinks fit, to turn out one Government and put in another, without an election.”⁷

Responsible government dictates that the Crown will appoint ministers who hold the confidence of the House of Commons. This ensures that ministers are available to the House of Commons. Another indication of this point is the practice of not appointing Senators to the Cabinet, although it has occurred. The executive is composed of individuals who are usually Members of Parliament. The Crown acts on advice of the ministers, who are expected to be collectively responsible for policy decisions to the House. As such, if a minister loses the confidence of the House, his

⁴ Patrick Macolmson and Richard Myers, The Canadian Regime (Peterborough: Broadview Press, 1996), 60.

⁵ Jennifer Smith, “Democracy and the Canadian House of Commons at the millennium,” Canadian Public Administration 42 (1999), 406.

⁶ Privy Council Office, Responsibility in the Constitution (Ottawa: Minister of Supply and Services, 1993), 38.

⁷ Eugene Forsey, “What is Parliamentary Responsible Government?” in The King Byng Affair, 1926: A Question of Responsible Government, ed. Roger Graham (Toronto: CoppClark, 1967), 119.

or her resignation is expected; if a government loses the confidence of the House, dissolution of Parliament may be the result.⁸

The implementation of responsible government in Canada was intended to stop warring in the legislature between the governor's supporters and his opponents and to make the executive accountable to the legislature for policy, patronage and departmental administration and, most importantly, to provide for a "constitutional opposition."⁹ This constitutional opposition would be "a focused opposition that would watch and control the government, remind it of the alternative points of view in the electorate, perhaps occasionally aid it, but certainly be unable to prevent it from prosecuting the public business with vigour and energy."¹⁰ In more recent years there has been much talk about the opposition in Canada. Often the focus of the discussion is on the weakness of Canada's opposition parties. Increased interest in Officers of Parliament may in part be explained by weak opposition parties. In fact, it is suggested that Officers of Parliament assist the opposition. Senator Michael Pitfield explains that Officers of Parliament "do the members' work, and they are armed with special powers for that purpose-powers that members do not have individually, powers of a scope or kind that they should be exercised only in the name of Parliament as a whole."¹¹ Officers of Parliament are "the officers of all members, particularly opposition members."¹²

⁸ Malcolmson and Myers, 60-61. Malcolmson and Myers explain that "when the House expresses a lack of confidence in a ministry (either by adopting an explicit motion of non-confidence or by voting down a proposal that the ministry deems a matter of confidence), responsible government has in a sense broken down because the executive is no longer acting in a manner that reflects the wishes of a majority of the people's representatives. In order to keep responsible government going, then, either the ministry or the House must be replaced."

⁹ Jennifer Smith, "Responsible Government and Democracy," in Taking Stock of 150 Years of Responsible Government in Canada, eds. F. Leslie Seidle and Louis Massicotte (Ottawa: Canadian Study of Parliament Group, 1998), 24.

¹⁰ Ibid.

¹¹ Canada, Senate, Debates, 27 June 1990, 2200.

¹² Ibid.

To fully understand responsible government, it is important to be familiar with the word responsible. In this instance, responsible has three meanings. First, ministers and cabinet have been granted power to advise the Crown and are responsible for the use of this power. As well, Ministers are responsible for the administration of their departments and must be held accountable for the actions of the their department. Thus, collectively, cabinet and government are responsible for the general management of government. Second, government is expected to be a responsible “steward of the nation’s affairs.” In this sense, responsibility is to represent the balancing act governments must do in order to respond to the national interest in the development of policy. The third meaning of responsible is that ministers are not only “responsible *for* the use of these powers, but are also responsible and accountable *to* parliament.” Therefore, cabinet and government are responsible to a body of elected members who represent the people.¹³

Ministerial responsibility is one of the key components of the concept of responsible government because it provides for accountability throughout the system.¹⁴ The use “of these powers, for which ministers are constitutionally responsible to Parliament, provides the foundation of responsible government.”¹⁵ This includes the two central ideas of legal and political responsibility. This means that the minister is responsible for all acts of the Crown under the minister’s supervision. Political responsibility refers to the principle that “the minister is the sole representative *to* the House and the focus *in* the House for those seeking answers and redress.”¹⁶

¹³ C.E.S. Franks, The Parliament of Canada (Toronto: University of Toronto Press, 1987), 10-11. Emphasis in original.

¹⁴ Privy Council Office, 4.

¹⁵ Ibid.

¹⁶ S.L. Sutherland, “Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem,” Canadian Journal of Political Science 24 (1991), 96. Emphasis in original.

Furthermore, collective responsibility of ministers is imperative to “providing the stability and unity essential to the conduct of ministerial government.”¹⁷ The majority party’s claim to form a government is protected by collective responsibility in two ways. First, collective responsibility protects a minister who is under attack. Second, it reinforces the prime minister by “inviting dissident ministers to accept a policy or leave.”¹⁸ The rules of the doctrine of collective responsibility ensure “that the Government should stand or fall as one ‘administration;’ ... that the administration speaks formally to Parliament with one voice, and that ministers collectively resign or the Government asks for dissolution if defeated in the Commons on a matter of confidence.”¹⁹

While responsible government is the theory on which the Canadian parliamentary system is based, “Canadians seem particularly willing to accept that the doctrine of ministerial responsibility has mostly outlived its applicability to modern political life.”²⁰ In short, there are a number of problems with the operation of this theory. First, some critics suggest that because of the growth of bureaucracy it is no longer possible for ministers to have control over all the intricate details of their departments.²¹ Others, such as Sharon Sutherland, argue that ministers were never really aware of every detail in their department, and although the theory of responsible government, it is thought, may demand the resignation of a minister who finds himself or herself in the middle of a departmental disaster, such has rarely occurred.²² Convention notwithstanding, responsible government does not lead to a

¹⁷ Privy Council Office, 4.

¹⁸ Sutherland, 95.

¹⁹ Ibid.

²⁰ Ibid., 91.

²¹ Réjean Pelletier, “Responsible Government: Victory or Defeat for Parliament?” in Taking Stock of 150 Years of Responsible Government in Canada, eds. F. Leslie Seidle and Louis Massicotte (Ottawa: Canadian Study of Parliament Group, 1998), 52-53.

²² Sutherland, 100-105.

responsive government.²³ Consequently, the line of accountability often becomes blurred and difficult to follow, in large part because the growth in government has “brought with it the need to grant increasing powers of discretion to the executive side of government.”²⁴

It is important to remember that responsive government is the desired result of responsible government. In fact, “the central feature of individual ministerial responsibility for administration is that [it] offers a timeless focal point for legal, political and *administrative* responsiveness.”²⁵ In the past, governments were perceived to be responsive because it was thought that they were answerable to the people through Parliament. Due to the distorted line of accountability and the misconception of how responsible government is supposed to work, people no longer see the benefit of being represented by their member of Parliament. The introduction of the Canadian Charter of Rights and Freedoms has encouraged the recognition of various organisations representing women, Aboriginal peoples, and others, which has led to different beliefs about the way government handles the affairs of citizens. As a result, the traditional theory of responsible government is increasingly called into question.²⁶

Traditionally, political parties filled the representation void; however, “a number of factors associated with the growth of government and the operation of modern political parties make it increasingly difficult to meet [the] ... requirements

²³ Peter Aucoin, “Responsible Government and Citizen Engagement at the Millennium: Are Political Parties Irrelevant?” in Taking Stock of 150 Years of Responsible Government in Canada, eds. F. Leslie Seidle and Louis Massicotte, (Ottawa: Canadian Study of Parliament Group, 1998), 76.

²⁴ Donald C. Rowat, The Ombudsman Plan: The Worldwide Spread of an Idea, Revised 2nd ed. (New York: University Press of America, 1985), 49.

²⁵ Sutherland, 99. Emphasis in original.

²⁶ Lisa Young, “Value Clash: Parliament and Citizens after 150 Years of Responsible Government” in Taking Stock of 150 Years of Responsible Government in Canada, eds. F. Leslie Seidle and Louis Massicotte (Ottawa: Canadian Study of Parliament Group, 1998), 105.

of responsible government.”²⁷ When responsible government was introduced in the Canadas and Nova Scotia in 1848, the main societal division was religious. As ethnic, linguistic, regional and gender differences grew political parties attempted to diffuse these tensions as well. Whether or not they were actually successful in accommodating interests is debatable, but their perceived success is what is important. To those for whom these cleavages are important, it appears that parties have not been successful in ensuring the representation of their interests in Parliament. As a result, Parliament has been criticized for being “unrepresentative” and “unresponsive.” At root, the criticism is that when parties fail to represent their constituents, government ceases to be representative, and consequently, responsible to the people.²⁸

One consequence of this is that responsible government, at least in practice, is beginning to change. For example, governments will have to find alternative methods to ensure control and accountability in their departments. This point is significant because it carves out a functional role for Officers of Parliament within the Canadian parliamentary system. Whatever the state of the theory of responsible government, the practice has changed.

One could argue that it has been a series of failures of responsible government that has led to the use of Officers of Parliament. The creation of an independent Auditor General followed nearly a decade of “what must be one of the most preposterous series of incidents in the history of responsible government.”²⁹ An independent Chief Electoral Officer was established in response to the “chaotic”

²⁷ Royal Commission on the Economic Union and Development Prospects for Canada Volume Three (Ottawa: Minister of Supply and Services Canada, 1985), 36.

²⁸ Young, 115.

²⁹ Norman Ward, The Public Purse: A Study in Canadian Democracy (Toronto: University of Toronto Press, 1962), 64. For a description of the “preposterous series of incidents”, see this work, 62-67.

and “inefficient” execution of elections, which were run by the Clerk of the Crown in Chancery.³⁰ In the case of the Official Languages Commissioner, the Commissioner was appointed because the government had failed to adequately protect the language rights of French and English Canadians. It could be argued that the development of the Commissioners of Information and Privacy arose out of the desire to protect the information and privacy rights of Canadians before the government failed to do so. The debate around privacy “came to the political agenda in Canada in the 1960s and 1970s as a result of the computerization of personal information systems (especially in the public sector) together with the development of a universal identifier (the Social Insurance Number). No notable crisis precipitated anxiety over privacy, as happened in other countries.”³¹ Information legislation emerged in the later 1960s and early 1970s³² and was influenced by the legislation of other countries, particularly the United States, a country that at the time was plagued by accusations that government was too secretive.³³

Another problem with responsible government is that it is frequently misunderstood. For example, the House of Commons Procedure and Practice states that

responsible government has long been considered an essential element of government based on the Westminster model. Despite its wide acceptance as a cornerstone of the Canadian system of government there are different meanings attached to the term ‘responsible government.’ In a general sense, responsible government means that a government

³⁰ J.R. Mallory, The Structure of Canadian Government (Calgary: Gage Publishing Limited), 183-184.

³¹ Colin J. Bennett, “The Office of the Privacy Commissioner of Canada: Regulator, Educator, Consultant and Judge,” paper prepared for the conference “Independence and Responsibility: A Conference on the Officers of Parliament” in Saskatoon, Saskatchewan November 2nd and 3rd, 2001. Book forthcoming.

³² Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, Open and Shut: Enhancing the Right to Know and the Right to Privacy (Ottawa: Supply and Services, 1987), 2.

³³ Information Commissioner of Canada, The Access to Information Act: 10 Years On (Ottawa: Minister of Public Works and Government Services, 1994), 2.

must be responsible to its citizens, that it must operate responsibly ... and that its Ministers must be accountable or responsible to Parliament.³⁴

This description is noteworthy because it suggests that responsible government means responsible to the people, which is not exactly correct, at least not in the traditional British Parliamentary sense. This later understanding has considerable significance for Officers of Parliament because it gives them a new function in Canadian government- to hold government accountable not on behalf of Parliament but on behalf of Canadian citizens.

It is no exaggeration to say that Canadians are unclear about the definition of responsible government. This generalization includes some members of Parliament and, in particular, members of the Reform Party. Along with their promotion of direct democracy, the Reform Party has actively campaigned for changes in the House of Commons. One object of their crusade was free votes in the House, a goal that demonstrated their disdain for party discipline. More than this, it shows that they did not understand the principles and theory behind responsible government.³⁵

If members of Parliament do not understand the merits of responsible government, it is not surprising they are misunderstood by the general public. Many Canadians blame components of responsible government, such as party discipline, for the unresponsiveness of government. It seems that the general public lacks a full understanding of what responsible government is designed to do. Most people believe that responsible government means that government is directly responsible to

³⁴ Robert Marleau and Camile Montpetit (eds), House of Commons Procedure and Practice (Ottawa: House of Commons, 2000), 28.

³⁵ Smith, "Democracy and the Canadian House of Commons at the millennium," 401. Professor Smith holds "radical reformers argue that party discipline is undemocratic because it prevents members from giving voice and vote to the preferences of their constituents. Well, viewed in isolation, party discipline does sound undemocratic. However, it cannot be viewed in isolation but instead must be viewed in relation to the parliamentary structure of government versus opposition ... party discipline has to be considered as a component of a system that delivers on the democratic principle *in a particular way*." Emphasis in original, 417.

the people, rather than to the people through an elected body. Just as there is a difference between the provisions of government and “the actual conduct of government,”³⁶ there is a large gap between the *theory* of responsible government and the *understanding* of responsible government.

Part of the reason for the ambiguity about responsible government lies in its foundation- it was not constitutionally entrenched but rather is deeply embedded in conventions. Conventions change and so, too, does responsible government. Nearly a quarter of a century ago, the Royal Commission on Financial Management and Accountability (Lambert Commission) addressed this. It declared that “the principles of responsible government, while still generally accepted, are in danger of becoming irrelevant to the actual situation.”³⁷

Paul Thomas states that currently under responsible government, “it is the principal task of the legislature to compel the executive to boast and confess about its activities in public before a politically sophisticated and often critical audience as a method of generating wider understanding and support for government activities.”³⁸ This statement implies that there are other methods that would assist Parliament in drawing attention to important issues. These other instruments may be Officers of Parliament, or at least, this may be one of their roles.

Since Officers of Parliament do not report through a minister, they are often seen as a contradiction to responsible government. Rather than look at Officers of Parliament as mechanisms that contradict responsible government (since they are independent of the executive), they can be viewed as a tool that helps governments

³⁶ David E. Smith, The Invisible Crown: the First Principle of Canadian Government (Toronto: University of Toronto, 1995), 95.

³⁷ The Royal Commission on Financial Management and Accountability Final Report (Ottawa: Minister of Supply and Services, 1979), 370.

³⁸ Paul G. Thomas, “The Lambert Report: Parliament and Accountability,” Canadian Public Administration 22 (1979), 557.

be responsible. Parliament plays a significant role in holding the government accountable.³⁹ If one of their jobs is to seek to hold government accountable, then an argument could be made that these Officers are actually an extension of Parliament (albeit as immune as a federal judge to Parliament's wishes). As such, they have become a part of responsible government in Canada. In 1947, Liberal government member James Sinclair stated: "Certainly the development of the position of the auditor general has gone step by step with the development of responsible government in Canada."⁴⁰

The Lambert Commission (1979) attributed three tasks to Parliament: "to legislate, to grant supply and authorize the levying of taxes, and, ultimately, to support or replace the Ministry."⁴¹ The responsibility to govern does not rest with Parliament. Parliament's role, "which is of no less importance, is the continuous scrutiny that it is empowered to maintain over the Government's implementation of the measures to which Parliament has given assent."⁴² The scrutiny of Parliament

involves more than discussion and approval of legislation; it should encompass the review of public administration in the full sense of examining priorities, plans and their implementation. In other words, it should deal not only with the policies of government, but also with the efficiency and effectiveness with which programs are carried out to implement those policies.⁴³

It is in this respect -and not as a literal part of Parliament- that Officers of Parliament are an extension of Parliament's work. Officers of Parliament scrutinize the government in the areas of finance, language, information and privacy. Moreover, Officers of Parliament are expected to evaluate the effectiveness of government programs and ensure that programs meet the intentions of Parliament.

³⁹ Royal Commission on the Economic Union and Development Prospects for Canada, 37.

⁴⁰ Canada, House of Commons, Debates 31 March 1947, 1901.

⁴¹ The Royal Commission on Financial Management and Accountability, 370.

⁴² Ibid.

⁴³ Ibid., 372.

The Officers of Parliament themselves appear to view their work as an extension of Parliament's work. In his 1992-1993 Annual Report, then Privacy Commissioner Bruce Phillips (1991-2000) said that part of the mission of the Privacy Commissioner was "to be Parliament's window on privacy issues, arming it with facts needed to make informed judgements through research and communications."⁴⁴ In his 1997 Annual Report, Phillips noted the impact of technology on personal privacy, and the role the Office of the Privacy Commissioner played in policy analysis and research that was "so essential to keeping Parliament and the public abreast of important information."⁴⁵

The Lambert Commission goes as far as to say that Parliament has failed to "legitimize" government because of the failure of Parliament to "undertake an open and comprehensible review of government expenditure and a comparison of results against stated goals."⁴⁶ The Commission continues claiming, "this failure on the part of Parliament to 'legitimize' government exacts a price in public trust."⁴⁷ This is supported by evidence that suggests that the majority of Canadians feel that their system of government is corrupt.⁴⁸ Confidence is renewed in government when an independent authority is appointed to watch over government policies. Regarding Canada's Anti-terrorism legislation, Bill C-36, the Senate Committee reviewing the bill recommended an Officer of Parliament to oversee the legislation. Officers of Parliament create trust because of their independence of government.⁴⁹ New Democratic Party member Bev Desjarlais proclaims that "in spite of Canadians not

⁴⁴ Privacy Commissioner of Canada, Annual Report 1992-1993 (Ottawa: Canada Communication Group, 1993), v.

⁴⁵ Privacy Commissioner of Canada, Annual Report 1997-1998 (Ottawa: Minister of Supply and Services, 1998), 8.

⁴⁶ Royal Commission on Financial Management and Accountability, 372.

⁴⁷ Ibid.

⁴⁸ Jane Taber, "PM instructs MPs to tell nations 'we're honest'," National Post 25 April 2002,

A1.

⁴⁹ Hugh Winsor, "Ramming terror bill into law could backfire," Globe and Mail, 29 November 2001, A14.

having faith in our democratic system, politicians, the government and specifically the Prime Minister ... I would wager a fair chunk that they have faith in the Auditor General ... and in the position that he holds.”⁵⁰

It is not unusual for governments to turn to other avenues in order to help relieve members of Parliament of their heavy workload, to let citizens to have their say and to present, at least in appearance, a more responsible, representative and accountable government. Governments have used a number of different resources to ensure accountability and responsibility. Regulatory agencies and royal commissions are two examples. However, it is possible to include Officers of Parliament in this category. Although each of the above mechanisms functions in a different way, one of their goals, as with Officers of Parliament, is to ensure the responsiveness of government.

Regulatory agencies can be independent from government and have a number of different functions. Relative to this discussion, these agencies exist to research and provide information on policies, as well as to offer advice to government. In addition, they remove an issue from the political realm. They are another way for governments to deal with problems that arise in a way that appears accountable to the public.

Canadian governments also utilise royal commissions. Since Confederation, there have been more than 400 federal commissions of inquiry which are generally assumed to have had the powers of a royal commission.⁵¹ Royal commissions are “*ad hoc* bodies, authorized by the government and tasked with the responsibility of

⁵⁰ Canada, House of Commons, Debates 5 April 2001.
http://www.parl.gc.ca/37/1/parlbus/chambus/debates/044-2001-04-05/han004_1300-e.htm
Retrieved 30 April 2002.

⁵¹ James Murray Whalen, Records of Federal Royal Commissions Volume 1, Government Archives Division, General Inventory Series, (Ottawa: National Archives of Canada, 1990), ix.

either investigating an incident, an issue or a policy matter.”⁵² Royal commissions illustrate the willingness of the government to remove an issue from politics, and are just one method governments use for the analysis of policy. These independent bodies free busy members of Parliament, who “lack expertise and are too dedicated either to pleasing their party or their constituency,” and allow for impartial examination of the issue.⁵³

In Great Britain, the solution to the problem of an unresponsive government seems to closely match the role of Officers of Parliament. The following quotation outlines the need for responsibility and an instrument that is able to tame governments. It calls for a tool of democratic accountability that has a place within Parliament.

The need, then, is for a contemporary theory and practice of responsibility. It is too important simply to be entrusted to the fictions of an inherited constitutional doctrine ... the extended state of big government and quasi-government ... with its intimate connections with the nexus of private governments, demands an equally extensive network of democratic accountability. This needs to be as varied, complex and extensive as government itself. It should supplement and nourish the political responsibility of adversarial party politics. It cannot be confined to Parliament; but Parliament can put it in place and watch over it.⁵⁴

Like royal commissions, the five Officers of Parliament provide objective and independent advice to government. Each is required to investigate, study and recommend to government, in order to increase accountability and responsiveness in situations that are highly contentious such as financial management and accountability, language or election administration. Each of these topics has been

⁵² Barry S. Harrison, “Canadian Royal Commissions of Inquiry,” Prepared for presentation at the ACSUS Biennial Conference, November 17-21, 1999, 6.

⁵³ Ibid., 9.

⁵⁴ Tony Wright, Citizens and Subjects: An Essay on British Politics (New York: Routledge, 1994), 49.

reviewed by a royal commission and is currently overseen by an Officer of Parliament.

Parliamentary government in Canada has been

a process of narrowing the exercise of the prerogative authority by subjecting it increasingly to the pre-eminence of the statutory authority, substituting the authority of the Crown in Parliament for the Crown alone. This process may aptly be characterized as having made the Crown responsible to Parliament for the exercise of its power. The Crown continues to exercise the legislative power, but it can only do so with the approval of Parliament.⁵⁵

This is the principle of responsible government. The Crown exercises power only with the approval of Parliament. This idea leaves little room to explain the function of the extra-Parliament forces such as Officers of Parliament. The use of these additional instruments illustrates that adaptation of the system was needed. Due to a number of changes, and an unclear understanding of responsible government, Canadians felt that their government was no longer responsible. Because of this, governments were forced to create different devices to appease the electorate and 'boast' responsive, responsible, accountable government. Officers of Parliament help them do this by functioning as an independent arm of Parliament that investigates, researches and recommends to the government on Parliament's behalf. While the Auditor General and Chief Electoral Officer were created long before the societal changes discussed above or before "post-modern" attitudes to responsible government, their role as Officers of Parliament has increasingly come to include holding government responsible.

Officers of Parliament serve both government and Parliament. These Officers remove some of the workload and expectations of Parliament. By promoting themselves as Officers of Parliament, their recommendations and reports are viewed

⁵⁵ Privy Council Office, 11.

differently than a report coming from the government side. Parliament is assisted in its research function and is able to claim that it more effectively holds government to account. Government benefits from Officers of Parliament because it is able to appear more accountable and responsive to the electorate. Through the annual reports of the Officers, Parliament and government are able to assess the performance of government in the areas of financial management, elections, language policy, information availability and protection of personal privacy. From here, the government is able to claim accountability since it is examined on a regular basis and "accountability depends upon systematic means of assessing performance."⁵⁶

Officers of Parliament fit into the changing needs and ideas of what responsible government is. While the convention of responsible government states that the executive is answerable to Parliament, the reality is that the Canadian electorate will no longer accept that definition. Canada's disgruntled electorate demands that government is more accountable and responsive and Officers of Parliament assist government with this goal. The Auditor General can be used as the representative Officer of Parliament. In the words of Robert Stanfield, Leader of the Opposition in the House of Commons (1967-1976): "From time to time, certain reports of the Auditor General are annoying, but there is no question about it, they make for better government."⁵⁷

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Privy Council Office, 93.

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Canada, House of Commons, Debates, 21 April 1970, 6113.

Chapter Two: Independence and Accountability

Two key factors relating to properly conceived Officers of Parliament are independence and accountability. It is in part from the idea of independence that Officers of Parliament are defined. Often the Officers invoke this feature in order to distinguish themselves from other instruments of government and Parliament.¹ While independence of the Officers is necessary, according to Canada's Chief Electoral Officer Jean-Pierre Kingsley, "independence, as a virtue, does not travel alone. It must be seen in the constant company of accountability."² Independence and accountability are crucial attributes because they confer on Officers of Parliament trust and legitimacy. Public trust arises when Officers of Parliament are seen to be independent from government; legitimacy arises when they are held accountable to Parliament.

The themes of independence and accountability will be the subject of this chapter. First, the concept of independence and its relation to Officers of Parliament will be discussed. This will include an evaluation of the independence of Officers of Parliament, realizing that this evaluation is challenged by the fact that each Officer of Parliament differs from the others. Second, the way in which Officers of Parliament are held accountable will be examined.

¹ See for example, Office of the Auditor General of Canada, 2001-02 Estimates: A Report on Plans and Priorities (Ottawa: Minister of Public Works and Government Services, 2001), 6; Canada, Senate, Proceedings of the Standing Committee on Legal and Constitutional Affairs 18 June 1998, number 30, 30-8.

² Jean-Pierre Kingsley, "Independence and Accountability Mechanisms in Federal Electoral Legislation," Office of the Chief Electoral Officers. Received through personal e-mail, Friday 15 March 2002.

2.1 Independence

The value of independence to an Officer of Parliament is illustrated in a discussion surrounding the creation of the Office of Chief Electoral Officer in 1920. One of Canada's politicians of the day, government member Hugh Guthrie, stated, "if we accept the principle that there must be a Chief Electoral Officer, that man must be independent of the Government of the day, and he must be placed in such a position as to make him independent of any Government or party."³

An illustration from a later date demonstrates why independence from the government is necessary for Officers of Parliament. In this instance, the government was that of Quebec and the office the provincial Ombudsman. The issue concerned social initiatives of the Lucien Bouchard government which the Ombudsman, Daniel Jacoby, criticized.⁴ When later Mr. Jacoby's second five-year mandate ended in August 1997, he was neither replaced nor his term renewed since the two-thirds vote of the National Assembly needed for approval could not be reached. The Ombudsman found his budget frozen and his credibility attacked by government.⁵ It was reasonable to conclude that Mr. Jacoby was being punished for his criticisms of the Bouchard government. This suggests that formal independence of the official from the government was not sufficient, as in this instance the government was able to freeze his budget.

³ Canada, House of Commons, Debates, 26 June 1920, 4266. It is worth noting that Guthrie was part of the Union government and therefore was familiar with the controversy surrounding the wartime election of 1917 when the War Time Elections Act and the Military Voters Act were passed, which may have affected his beliefs surrounding an independent Chief Electoral Officer. According to R. MacGregor Dawson, "The general purposes of these acts were plain and unmistakable: they were to give the vote to those who would support the government, to take it away from those who would oppose it, and to create a floating military vote, a large part of which would almost certainly be given to government candidates." R. MacGregor Dawson, The Government of Canada, 5th ed., revised by Norman Ward (Toronto: University of Toronto Press, 1970), 321-322.

⁴ Rheal Seguin, "Premier seeks 'lap dog,' says Quebec Ombudsman," Globe and Mail, 14 December 2000, A6.

⁵ Ibid.

According to a Senate Committee, independence is important because it creates public trust. The debate surrounding Canada's Anti-terrorism legislation, Bill C-36 indicates this. The Senate Committee that reviewed the bill recommended an Officer of Parliament be designated to oversee its implementation since "the key to creating public confidence . . . lies in an independent authority to ensure that its implementation reflects its intent."⁶ Appointing someone as an Officer of Parliament solidifies independence and signifies that loyalty must lie with the legislature and not with the governing party.⁷ As Canadian Alliance member John Reynolds said of the Auditor General: "One thing I know about [them], they don't necessarily do what ministers or the government tell them."⁸

Little has been written on the independence of Officers of Parliament. As such, it is difficult to evaluate them. The assessment of independence is further complicated by the many definitions of independence that exist. For example, the Law Reform Commission of Canada stated the following in their Report on Independent Administrative Agencies:

For some observers 'independence' imports judicial attitudes, and a commitment to process that courts display in their quest for dispensing justice in individual cases ... For other people, 'independence' implies the exclusion of executive control over agencies, and of ministerial responsibility to Parliament for the decision taken or policies pursued in the exercise of their mandates. For most, however, 'independence' implies a vague, shifting status that defies any clear understanding of how agencies, as entities that are not located within the central governmental organization, should interact in legal sense with other governmental institutions. Some are concerned that agencies, exercising the broad control over public and private

⁶ Hugh Winsor, "Ramming terror bill into law could backfire," Globe and Mail, 29 November 2001, A14.

⁷ John J. Kelly and Hugh R. Hanson, Improving Accountability: Canada Public Accounts Committee and Legislative Auditors (Ottawa: Canadian Comprehensive Auditing Foundation, 1981), 77.

⁸ Daniel Leblanc, "Ottawa sends two reports by ad agency to auditors," Globe and Mail, 20 March 2002, A9.

interests that Parliament gives them, may not be held sufficiently accountable politically; others are concerned that political interference with an 'independent' agency may compromise its ability to reconcile those interests, and contradict the very reasons that motivate resort to this model.⁹

If there are so many definitions of independence, how can it be properly assessed? For an answer to this question, one turns to R. MacGregor Dawson. Although he wrote in the early 1920s (in his doctoral thesis, later published), his argument is still relevant today. Dawson states that "the independent condition arises when the political responsibility is abandoned or suspended,"¹⁰ meaning there is no political consequence for the actions of an individual. Dawson notes that there is no independence in the absolute sense of the word. The key point surrounding independence is whether the official has enough independence to complete effectively and efficiently his or her task.¹¹ The earlier example of Daniel Jacoby illustrates a situation of inadequate independence since he was condemned for criticizing "the government's resistance to accepting a compensation package proposed by the Ombudsman in 1997 for the so-called Duplessis orphans."¹² Mr. Jacoby was also critical of new social initiatives introduced by the Bouchard government, such as the "Ministry of Health plans to have poor people pay for prescription drugs."¹³ These attacks by Mr. Jacoby should not be viewed as

⁹ Law Reform Commission of Canada, Report on Independent Administrative Agencies: A Framework for Decision Making (Ottawa: Law Reform Commission of Canada, 1985), 7.

¹⁰ R. MacGregor Dawson, The Principle of Official Independence (London: P.S. King and Son, Ltd, 1922), 4.

¹¹ Ibid., 10.

¹² Seguin, A6. The Duplessis orphans "were children born out of wedlock in the 1940s and 1950s who were often mistreated after being wrongly interned in mental hospitals."

¹³ Ibid.

malicious as such criticism of the government by an Officer of Parliament has become common practice.¹⁴

Dawson argues that independence provides certain advantages, such as public trust, that cannot always be gained through a political body. He cites the example of judges, stating that “it cannot be denied that their independence as such gives them no small amount of prestige. It is realised that the judges have nothing to lose by doing what is right as well as nothing to gain by doing what is wrong.”¹⁵

In addition, Dawson argues that independence breeds permanence which brings with it a certain degree of specialization that cannot be assured when an official is forced to leave with a change in government.¹⁶ Tenure, security of office, and removal procedures are important to the independence of an official. Tenure and security of office, for example, eliminate the fear of losing one’s job over criticism of the government. Furthermore, the removal procedure is also significant. Dawson suggests that the more difficult the removal process, the greater the independence granted to an individual because one does not have to fear losing one’s job because of disapproval over government action.¹⁷ Consider, for instance, the difference inherent in appointment at pleasure and appointment on good behaviour. The latter requires a showing of ‘cause’ before removal and therefore contributes to the independence of an individual.

Salary is also an imperative factor in ensuring independence. If the salary is set by government, the Officer becomes dependent “on the pleasure of the executive for remuneration,” allowing governments that are dissatisfied with the actions or

¹⁴ For one of many examples, see the “Groupaction Affair” where Auditor General Sheila Fraser harshly accused senior public servants of breaking “just about every rule in the book.” Andrew McIntosh and Jane Taber, “Auditor-General asks RCMP to probe federal contracts,” National Post 9 May 2002, A1.

¹⁵ Dawson, 11.

¹⁶ Ibid.

¹⁷ Ibid., 17.

reports of Officers to penalize, or, as important, to threaten to penalize them through salary adjustments.¹⁸

Adding to the discussion of the independence of Officers of Parliament, the Independent Review Committee on the Office of the Auditor General listed several conditions it believed were necessary to ensure the independence of the Office of the Auditor General, such as appropriate tenure and removal procedures. It defended the independence of the Auditor General, which on occasion has been called into question because appointment rests with the Governor-in-Council. According to the Independent Review Committee, this does not compromise the independence of the Auditor General. Indeed, it “is consistent with the manner of appointment used for judges and others of whom independence is expected.”¹⁹

Political scientist Denis Saint-Martin addresses independence in his evaluation of the statutory relationship between the Officers of Parliament. He states that the reporting procedure is important to the Officers’ independence. While they report to Parliament, they do not depend on Parliament for their authority because statutes regulate the authority of Officers of Parliament.²⁰ Saint-Martin argues that independence requires that the Officers of Parliament must not be under the control of the organization they investigate. In this case, that means that Officers of Parliament should not be under the control of the executive. This independence is protected by the Officers’ reports to the House of Commons, their appointment and removal procedures.²¹

¹⁸ Kelly and Hansen, 83.

¹⁹ Independent Committee of the Review of the Office of the Auditor General, Report of the Independent Review Committee on the Office of the Auditor General of Canada (Ottawa: Information Canada, 1975), 92.

²⁰ Denis Saint-Martin, “Should the Federal Ethics Counsellor Become an Independent Officer of Parliament?” Paper prepared for the Conference “Independence and Responsibility: A Conference on Officers of Parliament,” Saskatoon, Saskatchewan, November 2nd and 3rd, 2001, 15.

²¹ Denis Saint-Martin, Building the New Managerialist State: Consultants and the Politics of Public Sector Reform in Comparative Perspective (Toronto: Oxford University Press, 2000), 137.

The above discussion outlines a number of criteria necessary to ensure the independence of an Officer of Parliament; however, the challenge in the evaluation of independence, as noted previously, is that no two Officers are alike. Therefore, the test of independence cannot be uniform. Each Officer has characteristics specific to his or her office that affect their independence, both positively and negatively.

In a court challenge to the independence of the Information Commissioner²² Justice Campbell of the Federal Court of Canada quoted Chief Justice Lamer of the Supreme Court of Canada in *R. v. Généreux* and his interpretation of independence. According to Chief Justice Lamer, the test for independence, for the purposes of section 11 (d) of the Charter is

not [to] prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent ... It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.²³

The importance of the perception of independence is evident as well during debates in the House of Commons and the Senate over the appointment of Officers of Parliament. For instance, there was opposition to the appointment of Bruce Phillips as Privacy Commissioner (1991-2000). A former journalist for Southam News (1957-1969) and Chief of the Ottawa Bureau for the CTV television network (1969-1984), Phillips was also the Minister of Public Affairs in the Canadian Embassy in Washington (1985-1987) as well as the Director of Communications in the Office of

²² Rowat V. Canada (Information Commissioner) (2000), 193 F.T.R. 1.

²³ John Reid, "Round Table Remarks Prepared For A Conference on Independence and Responsibility for Officers of Parliament," Paper presented at the conference "Independence and Responsibility: A Conference on the Officers of Parliament," Saskatoon, Saskatchewan, November 2 and 3, 2001, www.infocom.gc.ca, Retrieved 27 February 2002, 4.

the Prime Minister (1987-1990).²⁴ Phillips was judged by some as being too close to the governing Progressive Conservative Party. NDP member of Parliament, Svend Robinson commented:

What we are saying is that in this appointment perception is as important as reality, and that the perception of those Canadians who are deeply concerned about the protection of their privacy against attacks by the government and the erosion of their privacy, is that a person who comes out of the Prime Minister's Office and goes into that position is not going to effectively stand up and defend his or her privacy.²⁵

Returning to the Supreme Court of Canada and *R. v. Généreux*, Justice Lamer also listed three conditions he viewed as essential to independence of the Officers. These include security of tenure, a degree of financial security and "institutional independence with regard to administrative matters, specifically those that relate to the exercise of the tribunal or individual's judicial function," while acknowledging that there will necessarily be some continued relationship between "decision-makers and the Executive."²⁶ This observation is essential because it recognizes that complete independence, in the sense of detachment, is not possible and that the appearance of independence is as important as actual independence itself.

Paul Thomas offers a set of criteria to help assess the independence of an Officer of Parliament. It includes the terms of the mandate, the decisions surrounding budget and staffing, and the ability of the agency to "identify issues for study and whether it can compel the production of information."²⁷ In light of the

²⁴ Elizabeth Lumley, (ed), *Canadian Who's Who 2001*, vol 36 (Toronto: University of Toronto Press, 2001), 1028.

²⁵ Canada, House of Commons, *Debates*, 7 June 1990, 12436.

²⁶ Reid, 4.

²⁷ Paul Thomas, "The Past, Present and Future of Officers of Parliament," Paper prepared for the Conference "Independence and Responsibility: A Conference on Officers of Parliament," Saskatoon, Saskatchewan, November 2nd and 3rd, 2001, 21-22.

foregoing, can it be said that Canada's Officers of Parliament are sufficiently independent from government?

No single answer will do. Rather, individual examples of Parliamentary officers must be examined. First, consider the Auditor General. Appointed by the Governor-in-Council for a term of ten years, the Auditor General can be removed by the Governor-in-Council on address of the Senate and House of Commons.²⁸ The salary of the Auditor General is equal to that of a puisne judge of the Supreme Court of Canada.²⁹ Although the Auditor General relies on government for his or her appointment, other factors, including tenure, removal procedure and salary, ensure the independence of the Auditor. Furthermore, the requirement of reporting to Parliament through the Speaker of the House of Commons indicates that the Auditor is answerable not to government but rather to Parliament. The Auditor General also has the right to recruit his or her own staff and set the terms and conditions of their employment, in accordance with the Public Service Employment Act (R.S.C. 1985, c. P-33). Protected as to the conditions of work, the office of the Auditor General also establishes its agenda and has the additional right to request information from the government that may be integral to the proper management of the auditing process.³⁰ Another contributing factor to the Auditor's independence is the professional qualifications of the individual chosen. Formal education and experience help guarantee expertise in judgment and, therefore, confidence that the government will not control the Auditor General.³¹

²⁸ Auditor General Act R.S.C., c.A-17, 1995, c. 43, s. 1, www.oag-bvg.gc.ca retrieved 6 October 2001, section 3(1), 1-2.

²⁹ *Ibid.*, section 4(1), 2.

³⁰ Office of the Auditor General, What We Do, www.oag-bvg.gc.ca retrieved 28 January 2002.

³¹ Ross A. Denham, "The Canadian Auditors General- What is their Role?" Canadian Public Administration 17 (1974), 266; Kelly and Hanson, 78; Report of the Independent Review Committee on the Office of the Auditor General of Canada, 92.

The major source of controversy surrounding the independence of the Auditor General touches on the budget procedure. Since constitutional principle and statutory law state that “spending must originate with the Crown (i.e., the cabinet) governments have insisted on strict control over the expenditure budget process.”³² Some critics say that this requirement most adversely affects the independence of the Auditor General. Several suggestions have been made to rectify this situation. For example, Paul Thomas notes that in both New Zealand and the United Kingdom there is a degree of parliamentary involvement in setting the budgets for the national audit offices.³³ In New Zealand there is an Officers of Parliament Committee that makes the final decision regarding funding for the Officers.³⁴

Former Auditor General Denis Desautels (1991-2001) also favoured following foreign models for improving budget allocation. In his final annual report to Parliament, he suggested that removing the Treasury Board from the budget decision-making process could strengthen the independence of the Auditor General. He recommended the arrangement employed by the United Kingdom where an all-party committee of members of Parliament sets the budget of the National Audit Office.³⁵

The independence of the Commissioner of Official Languages is also protected by appointment, salary, tenure, and removal procedures. The Commissioner of Official Languages is appointed after approval of the appointment by a resolution of the Senate and House of Commons. The term is seven years, with the option of reappointment; removal is only possible by the Governor-in-Council on

³² Thomas, 27.

³³ Ibid., 27-28.

³⁴ Sir Geoffrey Palmer and Dr. Matthew Palmer, Bridled Power: New Zealand Government under MMP (New York: Oxford University Press, 1997), 224.

³⁵ Maria Barrados and Jean Ste-Marie, “The Auditor General of Canada: An Independent Servant of Parliament,” Paper prepared for the conference “Independence and Responsibility: A Conference on the Officers of Parliament,” Saskatoon, Saskatchewan, November 2 and 3, 2001, 9.

address of the Senate and House of Commons.³⁶ The salary of the Commissioner of Official Languages should be equal to that of a Federal Court Judge, other than the Chief Justice or the Associate Chief Justice.³⁷ Again, the independence from government is illustrated by the reporting requirement to Parliament, rather than to the executive.³⁸ Budgets and staffing for the office of the Language Commissioner is subject to regulations of the Treasury Board. Currently, the staff of the Commissioner is part of the federal public service which means that “all collective bargaining agreements entered into by [the] Office must be approved by the Governor in Council.”³⁹ Because of this arrangement, the independence of the Commissioner could be compromised as it may discourage criticisms of the executive for fear of consequences, such as budgetary restraint.⁴⁰ Again, the recommendation of a Parliamentary Committee to oversee the budgets of the Officers of Parliament has been suggested to strengthen the independence of this office.⁴¹

The Governor-in-Council appoints the Information Commissioner after approval of the appointment by a resolution of the House of Commons and Senate.⁴² The current Information Commissioner, John Reid (1998-present), was the first Officer of Parliament to be reviewed by committees of the Senate and House of Commons prior to a formal nomination from the government.⁴³ Reid comments that

³⁶ Official Languages Act R.S. 1985, c. 31 (4th Supp.), www.ocol-col.gc.ca retrieved 6 October 2001, section 49(1)(2)(3), 14.

³⁷ *Ibid.*, section 50(2), 14.

³⁸ *Ibid.*, section 66, 18.

³⁹ Commissioner of Official Languages Dyane Adam and Director, Special Investigations, Investigations Branch, Gilbert Langelier, personal interview, 6 May 2002. See “Note des Synthèse,”

2.

⁴⁰ *Ibid.*, 2.

⁴¹ Commissioner of Official Languages Dyane Adam and Director Special Investigations, Investigations Branch, Gilbert Langelier, personal interview, 6 May 1994.

⁴² Information Commissioner of Canada, “Access to Information Act: R.S.C. 1985, c. A-1, section 54(1)” in Access to Information Act: An Indexed Consolidation (Ottawa: Minister of Supply and services, 1994), 84.

⁴³ Thomas, 26.

his appointment illustrates the demand for an independent Officer of Parliament. By having the candidate reviewed and approved by both the Senate and the House of Commons, the government guarantees that its appointee is a unanimous choice. The adoption of this type of nomination and appointment process would help to eliminate the possibility of disagreement between the government and Opposition over the nomination of Officers of Parliament and would further strengthen the independence and credibility of Officers of Parliament.

During the process that saw Reid appointed as Information Commissioner, parliamentarians were not in favour of the government's first nominee, Mary Gusella, "a long-time senior bureaucrat," as she was not seen as having enough distance from the government.⁴⁴ It is Reid's opinion that "this pre-appointment scrutiny, a first for the House of Commons and Senate, was a healthy development in the appointment process for officers of Parliament" (which designation he limits, as does this thesis, to the Information Commissioner, the Privacy Commissioner, the Commissioner of Official Languages, the Chief Electoral Officer, and the Auditor General), and "seems eminently well-suited for officers of Parliament."⁴⁵

The Information Commissioner holds office for seven years, is eligible for reappointment at the expiration of his or her term, and may only be removed by the Governor-in-Council on address of the Senate and House of Commons.⁴⁶ Like the Commissioner of Official Languages, the Information Commissioner is paid the salary of a Federal Court judge who is neither a Chief Justice nor an Associate Chief Justice.⁴⁷

⁴⁴ Information Commissioner of Canada, Annual Report 1998-1999 (Ottawa: Minister of Supply and Services, 1999), 2.

⁴⁵ Ibid., 3.

⁴⁶ "Access to Information Act," section 54(2), 84.

⁴⁷ Ibid., section 55(2), 85.

The work of the Office of the Information Commissioner is generally determined by the public through the complaints process. However, the Commissioner is able to initiate investigations if it appears that there is sufficient evidence that an investigation is needed.⁴⁸ The Information Commissioner is free to hire his or her own staff, as long as the hiring process and terms of employment coincide with the Public Service Employment Act.⁴⁹

Commissioner Reid notes that there are other aspects to the independence of an Officer of Parliament. While it is necessary for an Officer to be independent of government, it is also important for the Officer to maintain a degree of independence from the complainants. It is Reid's view that "what keeps Information Commissioners from becoming too pro-complainant is his or her need to convince, not order, the government to do the right thing. No Commissioner can accomplish the mission if he is perceived as biased in favour of complainants."⁵⁰ Former Commissioner John Grace (1990-1998) agrees. He knew he had found the correct formula for independence when he was "getting criticized from both sides."⁵¹

The budget of the Information Commissioner falls under the control of the Department of Justice, a fact the Commissioner finds unpalatable because "it undermines both [his] actual and apparent independence."⁵² The Commissioner's attitude is understandable since the Minister of Justice is his adversary in any legal action undertaken by the Information Commissioner. For instance, at the time of the Annual Report of 1998-1999, the Justice Department was "party to litigation seeking

⁴⁸ Ibid., section 30(3), 71.

⁴⁹ Ibid., section 58, 88.

⁵⁰ Reid, "Round Table Remarks Prepared for a Conference on Independence and Responsibility for Officers of Parliament," 3.

⁵¹ Ibid.

⁵² Annual Report 1998-1999, 3.

to limit the scope of the commissioner's jurisdiction."⁵³ Furthermore, the Minister of Justice is the legal adviser to any department that finds itself under investigation by the Information Commissioner.⁵⁴ In view of this apparent conflict of interest, the Information Commissioner believes that it is not appropriate for the Minister of Justice to have control over the Commissioner's requests to the Treasury Board for resources: "However careful the Minister may be not to interfere, as long as there is the possibility of holding the Information Commissioner's resources to ransom, the appearance of independence is undermined."⁵⁵

During his time as Information Commissioner John Grace shared these concerns. He questioned whether it was wise for the government to decide upon the level of funding for a servant of Parliament. While the former Commissioner recognized that his office was not alone in being subject to cutbacks, he noted that no one seemed aware of the special relationship the Commissioner had with Parliament. He claimed "no one from the Treasury Board asks if Parliament's work can be carried on effectively after an across-the-board cut. No one in government considers the implications of budget decisions on the office's independence."⁵⁶ John Grace observed that in Ontario, the budget of the Information and Privacy Commissioner is defended directly before a legislative committee, and he suggested this model might be useful at the federal level.⁵⁷

The Privacy Commissioner follows suit with the general "Commissioner" model; that is, appointment after the approval of the appointment by resolution of the

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Information Commissioner of Canada, Annual Report 1992-1993 (Ottawa: Minister of Supply and Services, 1993), 12.

⁵⁷ Ibid.

Senate and House of Commons.⁵⁸ There is uncertainty over whether it is convention to have the nominee for Privacy Commissioner appear before a parliamentary committee before the resolution is passed. This argument arose at the time of the appointment of former Privacy Commissioner Bruce Phillips.⁵⁹

Like the Information Commissioner, the Privacy Commissioner controls his own staff in accordance with the Public Service Employment Act.⁶⁰ Complaints to the Office set the agenda; however, with sufficient evidence the Privacy Commissioner may initiate the investigative process.⁶¹

With respect to the budget of the Privacy Commissioner, Phillips shared with the Information Commissioner a common anxiety:

The budget is set as part of the Department of Justice envelope. Thus my only avenue of budgetary appeal is to ask the Minister of Justice (whose operations I may have to investigate) to beggar her own program. This arrangement sends all the wrong messages about the Office's independence and makes the principals profoundly uncomfortable.⁶²

The fact that the government sets the budget of the Officers is problematic, for it would appear that this arrangement might affect the independence of the Officers of Parliament. Phillips tends to think that it does. Slashing the budget of an Officer forces the Office to cut back in staff, thus making investigations of the government difficult to pursue. Mr. Phillips bluntly states the nature of the problem: "The credibility of my office and the investigative process depends to a significant extent on the ability of my investigators to go on site where these complaints occur; that is frequently out of town."⁶³

⁵⁸ Privacy Act, R.S. 1985, c. P-21 www.privcom.gc.ca
Retrieved 6 October 2001 section 53(1), 15.

⁵⁹ Thomas, 25.

⁶⁰ Privacy Act, section 58, 17.

⁶¹ *Ibid.*, section 29(3), 10.

⁶² Privacy Commissioner of Canada, Annual Report 1997-1998 (Ottawa: Minister of Supply and Services, 1998), 10.

⁶³ Canada, Senate, Debates, 18 February 1999, 2642.

Discontent can also be found in the Privacy Commissioner's annual reports. The Commissioner continues to express unhappiness about the independence of his office, which is compromised by the attachment of its budget to the Department of Justice, whose operations may at some future date be the subject of an investigation of the Privacy Commissioner.⁶⁴

The Chief Electoral Officer is appointed by a resolution of the House of Commons, holds tenure until age 65, and may be removed for cause by the Governor General on address of the House of Commons and Senate.⁶⁵ It would seem that the Chief Electoral Officer has more independence from the executive than his fellow Officers of Parliament since his appointment relies on a resolution of the House. Cabinet does not play a formal role in the appointment process of the Chief Electoral Officer.⁶⁶ As a result, the appointments of the Chief Electoral Officer tend to be uncontroversial. In fact, members from two Opposition parties seconded the appointment of the current Chief Electoral Officer Jean-Pierre Kingsley.⁶⁷ His salary is equal to that of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that Court.⁶⁸ As with the other Officers, the independence of the Chief Electoral Officer is furthered by his reporting procedure to Parliament, rather than to government.

The staff of the Chief Electoral Officer is hired in compliance with the Public Service Commission regulations with the exception of Returning Officers who are appointed by the Governor-in-Council. Personnel at polling stations are appointed

⁶⁴ Privacy Commissioner, Annual Report, 1997-98, 10.

⁶⁵ Canada Elections Act, 2000, c.9, www.elections.ca
Retrieved 6 October 2001, section 13(1)(2), 1.

⁶⁶ Thomas, 25.

⁶⁷ Louis Massicotte, "Refereeing the Political Process: The Chief Electoral Officer of Canada," Paper prepared for the Conference "Independence and Responsibility: A Conference on Officers of Parliament," Saskatoon, Saskatchewan, November 2nd and 3rd, 2001, 21-22.

⁶⁸ Canada Elections Act, section 15(2).

from lists compiled by the political parties who finished first and second in the constituency in the last election.⁶⁹

The Chief Electoral Officer may be the only Officer who does not have problems with the way his budget is assigned. Since it is not known in advance when an election will be called, the Chief Electoral Office does not have a predetermined budget. Although estimates are put forward each year, if an election is called, the estimated budget of the Chief Electoral Officer is disregarded.⁷⁰

For the most part, Canada's Officers of Parliament are independent animals, both in actuality and appearance. For the Information and Privacy Commissioners, apprehension arises out of concern that their office appear independent and that it not be compromised because of the current arrangement. Although the independence of some Officers could be enhanced through different budget distributions, in general the Officers do not seem to worry about excessive government interference.

As was mentioned earlier, independence can never be absolute. Officers of Parliament gain their legitimacy through their independence from government but their legitimacy also comes from the public's knowing that these Officers are not all-powerful creatures. Officers of Parliament must be both independent from government and accountable to Parliament. Although Parliament "may delegate its authority to an agency to operate independently or semi-independently from direct government control, [Parliament] cannot abrogate its responsibility."⁷¹

2.2 Accountability

The definitional problem that surrounds independence also surrounds accountability: "Since the concept of accountability is multifaceted in meaning and

⁶⁹ Maggy Mannard, Information Officer Elections Canada, personal telephone interview, 4 March 2002.

⁷⁰ Ibid.

⁷¹ Audrey D. Doerr, The Machinery of Government in Canada (Toronto: Methuen, 1981), 106-107.

often difficult to discern in practice, a comprehensive and universally accepted definition has yet to emerge.”⁷² The second problem surrounding accountability, as with independence, is that the literature on accountability is generally mute on these issues regarding Officers of Parliament.

Accountability has been defined as “that quality of a system that obliges the participants *to pay attention* to their respective assigned and accepted responsibilities, ... Thus, the likelihood that agreed goals and objectives would be attained is enhanced.”⁷³ The Independent Review Committee on the Office of the Auditor General explained, “accountability in its simplest terms [as] the obligation to answer for a responsibility that has been conferred. It presumes the existence of at least two parties: one who allocates responsibility and one who accepts it with the undertaking to report upon the manner in which it has been discharged.”⁷⁴

By these definitions, Officers of Parliament are accountable through the reporting procedure which accomplishes two things. First, it provides a report to Parliament about the investigations of the Officer and how government departments perform. Second, it provides a way of communicating with Parliament by explaining what the Officer has accomplished in the past year. Besides reporting procedures, Officers of Parliament are held accountable in other ways. One not immediately obvious is that each Officer of Parliament is held accountable to the other Officers of Parliament. Each Officer is free to ensure that their respective statutory obligations with respect to financial management, language, information and privacy are adhered to. Furthermore, each Officer is expected to go before a committee of Parliament.

⁷² Paul Thomas, “The Changing Nature of Accountability,” in Taking Stock: Assessing Public Sector Reforms eds. B.Guy Peters and Donald J. Savoie (Montreal and Kingston: McGill-Queen’s University Press, 1998), 351.

⁷³ Royal Commission on Financial Management and Accountability Final Report, (Ottawa: Minister of Supply and Services Canada 1979), 10. Emphasis in original.

⁷⁴ Independent Review Committee on the Office of the Auditor General, 9.

Again, the Treasury Board audits the Auditor General each fiscal year. Currently fifteen parliamentary committees discuss the reports of the Auditor General, while the annual spending estimates of the Auditor General are brought before Parliament. Moreover, the Public Accounts Committee can call on the Auditor General to explain spending and management practices of the Office. The scrutiny of the Office of the Auditor General by these committees serves to “promote accountability, good management practices, and sustainable development.”⁷⁵ Additionally, it also helps to bring attention, awareness and understanding to the issues facing the Office.⁷⁶ The Public Service Commission guarantees the Auditor’s obedience with the Public Service Employment Act.⁷⁷

The Commissioner of Official Languages also sees his or her report go before a parliamentary committee. After presentation to the Speakers of the House of Commons and of the Senate, the annual report is placed before the Standing Joint Committee on Official Languages. This Committee has been known to call the Commissioner before it, which “reproduces in brief the ongoing dialogue about language policy and administration that occurs in the larger society, and, in tandem, the critiques of the Commissioner’s role that arise from those various perspectives.”⁷⁸

Appearing before a Senate Committee of the Whole, former Privacy Commissioner Bruce Phillips explained his independence from government and accountability to Parliament. He stated:

⁷⁵ Office of the Auditor General, Performance Report for the period ending March 31, 2001 (Ottawa: Minister of Public Works and Government Services, 2001), 9

⁷⁶ Ibid.

⁷⁷ Office of the Auditor General, What We Do.

⁷⁸ C. Michael MacMillan, “Ombudsman or Active Conscience?: The Commissioner of Official Languages as an Agent of Change,” Paper prepared for the Conference “Independence and Responsibility: A Conference on the Officers of Parliament,” Saskatoon, Saskatchewan, November 2nd and 3rd, 2001, 11.

The process of appointment ... and the process of accountability by which I report only to the Speakers and to the members of both Houses is to make absolutely sure that there can be no perceived or actual conflict of interest in the operation of my office. I am not subject to a direction by any department of government. That is the principal difference between what I do and what, say, a deputy minister in a line department does. He is under the control of the minister and the executive of the day; I am not. I am under your control.⁷⁹

Sometimes the mechanisms of accountability are weakened when they are neglected by Parliament. This is the case with the Privacy Commissioner. Former Commissioner Phillips stated that while he was a parliamentary Officer, Parliament “[made] only occasional and cursory examination of the issues and our operations.”⁸⁰ He also stated that “this is the first time I have been called to appear before a Committee of the Whole of either house.”⁸¹ It should be noted that section 75(1) of the *Privacy Act* provides for a review of the Privacy Act by a committee of either House although these reviews rarely occur. The annual report of the Commissioner was examined in 1987, five years after the implementation of the Act. As of 1999 a revision of the Privacy Commissioner’s annual report had not since occurred.⁸² If accountability is to be equally important to independence then this neglect is a significant problem. In this case, Parliament’s failure to maintain the accountability of Officers of Parliament may be as serious as actual interference with the operation of a given office.

Information Commissioner John Reid explains that the accountability of his Office is a problem since the oversight committee neglects to take up his report. He claims that the “Justice Committee, which has oversight responsibility of the Office is one of the busiest H[ouse] of C[ommons] Committees. It does not have the time

⁷⁹ Canada, Senate, Debates, 18 February 1999, 2645.

⁸⁰ Privacy Commissioner of Canada, Annual Report 1997-1998, 9-10.

⁸¹ Canada, Senate, Debates, 17 February 1999, 2637.

⁸² *Ibid.*, 2642.

and energy to examine either the issues with which I am faced and which are described in my Annual Report nor does it have time and energy to deal with the financial state of the office.”⁸³ He adds that he is uncomfortable that his Office is accountable “to the authority under which we act.”⁸⁴ Commissioner Reid remarks that in addition to arrangements that could affect his independence, he also dislikes the fact that the neglect of his office affects his accountability.⁸⁵

Accountability, like independence, is a relationship. As such, when evaluating accountability it is necessary to ask such crucial questions as who, what, when, where and how? ⁸⁶ The short answer is that Officers are accountable to Parliament for their actions through their reporting procedures. The consequence of poor behaviour is removal from Office. In some instances, the Officers of Parliament have been criticized for their lack of accountability.⁸⁷ However, Commissioner Reid takes another tack- on the part of Parliament whose committees fail to acknowledge the reports of the Officers.

The independence of Officers of Parliament is important because it creates public trust. This is essential since the Officers exist to hold government accountable. Without ample independence from government, it is unlikely that Officers of Parliament would be taken seriously as “watchdogs of Parliament.” Independence allows the Officers to depict themselves as servants of Parliament and not servants of government.

⁸³ John Reid, personal e-mail communication sent Tuesday 19 February 2002.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Robert F. Adie and Paul G. Thomas, Canadian Public Administration: Problematical Perspectives, 2nd Edition (Scarborough: Prentice-Hall, 1987), 142.

⁸⁷ See for example, Sharon Sutherland, “The Office of the Auditor General of Canada: Watching the Watchdog” in How Ottawa Spends Your Tax Dollars: Federal Priorities 1981 ed. Bruce Doern (Toronto: James Lorimer and Company), 219. The flavour of Professor Sutherland’s argument is indicated by the following quotation: “The Office of the Auditor General itself needs the medication it has been offering the bureaucracy: some degree of accountability enforced from outside the agency, and some element of self-restraint.”

Several criteria help to ensure this condition. Tenure, salary, removal and reporting procedures are all important aspects of the independence of an Officer of Parliament. Also notable is the influence Officers have in setting their own mandate and hiring their own staff. Another significant dimension of independence is its appearance. Although there may be some problems with the way the budget of the Information Commissioner or the Auditor General is set, still there is no question that the Officers are independent. The ability of the Information Commissioner to criticize the government for the arrangement of his office under the Justice envelope indicates that there is a satisfactory degree of independence. The independence of Officers of Parliament, however, would be strengthened if their budgets were assigned by a committee of Parliament, rather than by government.

Accountability is essential because it guarantees the legitimacy of the Officers of Parliament. While it is necessary that these Officers be independent from government, there must be reassurance too that their power is not absolute. Accountability is achieved through annual reports to Parliament, a procedure that would be strengthened if Parliament reviewed these reports consistently. Indeed, there are areas where both the independence and the accountability of Officers of Parliament might be strengthened. Nevertheless, it is most important to recognize that these concepts, imperfectly realized, shape the role and function of Officers of Parliament.

Chapter Three: Relationship with a Bicameral Parliament

The role of the Senate in the Canadian parliamentary system is often overlooked or misunderstood by the public. Regardless of the public's perception of the legitimacy of the Senate, it is almost constitutionally equal in stature to the House of Commons. The only difference is that the House of Commons can initiate money bills and the Senate cannot. Therefore, when studying the Officers of Parliament it is important to remember that these Officers- the Auditor General, the Chief Electoral Officer and the Commissioners of Language, Information and Privacy- have relationships with both the Senate and the House of Commons. This is reflected for example, in the procedure for removing Officers of Parliament. Removal of an Officer is not permitted without an address from *both* the Senate and the House of Commons.

Although these five Officers all have statutory relationships with the Houses of Parliament, their individual relationships with each House differ. While the three Commissioners are required to report to both the House of Commons and the Senate through the Speakers of each House, the Auditor General and Chief Electoral Officer are required to report only to the House of Commons (through the Speaker), and not to the Senate. An examination of the relationship between Officers of Parliament and both the Senate and the House of Commons reveals much about the role of each House of Parliament, as well as about the function and perception of the Senate. The way an Officer is appointed, or the controversy surrounding the nomination of an individual for a position as an Officer of Parliament, exposes the dynamics of each House and the role that each plays in Canadian governance.

While there are five Officers of Parliament, this chapter will deal almost exclusively with the Auditor General, the Information Commissioner and the Privacy Commissioner. Although in each instance the appointment and reporting procedures of the Auditor General and Chief Electoral Officer exclude the Senate, the Chief Electoral Officer has little reason to interact with the Upper House since it is not an elected body. By contrast, the Auditor General deals with the finances of the nation. While the Senate is unable to initiate as money bills, the subject of the nation's finances still falls within the jurisdiction of the Senate. Although the Senate still has a role to play in election related issues such as redistribution,¹ the subject of elections does not attract the same level of consistent attention as the problems associated with finances, access to information and the protection of personal privacy.

The Commissioner of Official Languages has a unique relationship with Parliament, as this Officer is the only one whose report is examined by a joint committee of the two Houses. As with elections, the subject of language seems to attract less controversy than the work of the other Officers.

Evaluating the commonalities and the differences of each Officer to each of the Houses is difficult because of the distinctive features of each Officer. Like the reporting and removal procedures, the appointment of the three Commissioners is the same: the Governor-in-Council appoints each after approval of the appointment by the House of Commons and the Senate. Although these actions are conducted in the same way for the three this does not mean that the relationship between the Commissioners and both Houses of Parliament is similar. It is the character, as much as the procedure, that helps to shape the rapport with both the House of Commons and the Senate.

¹ See for example the debate surrounding the Electoral Boundaries Readjustment Suspension Bill, 1994. Canada, Senate, Debates 11 May 1994, 439-441.

The nature of each Office is key to determining the relationship with the chambers of the bicameral Parliament. The role of each Commissioner, for example, is to act as an ombudsperson dealing with complaints in the areas of language, information and privacy. Even here there is difference: the Information and Privacy Commissioners have a more controversial role than the Commissioner of Official Languages. The Commissioner of Official Languages works to ensure that the government, the public service and services under the jurisdiction of the federal government comply with the Official Languages Act. In addition, the Commissioner works closely with each House in the matter of language-related issues and legislation through participation with the Standing Joint Committee on Official Languages. Few people are particularly sensitive to language issues. Therefore, the role of the Official Languages Commissioner tends to be less controversial than the Information and Privacy Commissioners.

In contrast, information and privacy can be highly contentious subjects. As such, the association of the Commissioners with Parliament, specifically the Senate, differs. For example, while the statutory appointment route is consistent among the three Commissioners, the “unofficial” appointment process is not. Because of the desire for open government and the access to information, and the determination of people to hold onto their privacy, the appointments of the Information and Privacy Commissioners are often more controversial than that of the Commissioner of Official Languages.

As a way to ensure that candidates for Information and Privacy Commissioners are acceptable individuals for the task, individuals nominated for the positions appear before a Senate committee prior to the Senate’s offering its

approval.² This practice is a way for the Senate to exercise, or attempt to exercise, its equality with the House of Commons. These reviews became practice because, as Senator Ernest Manning explained, the Senate feared being “asked to ratify the appointment of someone we do not know at all; we [would] have no knowledge of his qualification, his background or anything else. [It] . . . simply turns the Senate into a rubber stamp.”³ Senator Charles McElman asserted that by calling the nominees before a committee of the Senate, it shows that “we can then act as we should act in this chamber, as people who take our responsibilities seriously.”⁴

Through these reviews the Senators emphasize that they are not servants of the government. In addition, the Senate wished to illustrate, contrary to what is often portrayed, that they are parliamentarians who appreciate the significance of their roles as parliamentarians. Moreover, these reviews ensure that the individual selected for a position as an Officer of Parliament is an appropriate person for the task.

The appointment of former Privacy Commissioner Bruce Phillips in 1991 offers an example of the kind of tension that can occur between the two Houses of Parliament. The appointment of Mr. Phillips was contested by the Senate and the Opposition in the House of Commons because of Mr. Phillips’ close personal relationship with the Conservative party and then Prime Minister Brian Mulroney. Phillips had been the Director of Communications in the Office of the Prime Minister from 1987-1990. Prior to that he had played an active role in the 1980 election campaign. NDP member Svend Robinson claimed that in the latter instance Mr. Phillips “admitted that during that campaign he called a lot of reporters and did

² Paul G. Thomas, “The Past, Present and Future of Officers of Parliament,” Paper prepared for the Conference “Independence and Responsibility: A Conference on Officers of Parliament,” Saskatoon, Saskatchewan, November 2nd and 3rd, 2001, 26.

³ Canada, Senate, Debates, 26 May 1983, 5647.

⁴ Ibid.

whatever he could to attempt to get them to write articles and columns that were critical, such as hatchet jobs on John Turner.”⁵

As a way of expressing its opposition, the Senate took nearly six months (a considerable length of time) to approve the appointment. Part of the complaint arose from the fact that the government had kept the Senate from adjournment in order to push through the appointment of Mr. Phillips. Senator Royce Frith, Deputy Leader of the Opposition, declared that the government had “resort[ed] to strong measures” to keep the Senate in session. According to Senator Frith, “the Senate cleaned up all of the government’s business except the Financial Administration Act. The study of the Financial Administration Act in the committee was to continue until the end of the month.” Senator Frith continued asking, “so what are we doing here?” He concluded, “we are here for Mr. Bruce Phillips; that is what we are here for.”⁶ From the point of view of members of the Upper House this extraordinary action presaged the possibility of even stronger ties between the government and the new Privacy Commissioner. Since Mr. Phillips would owe his position solely to the government, it was not clear whether this Privacy Commissioner would be a “watchdog” for Parliament or, in the words of Senator Ray Perrault, a “trained poodle” of the government.⁷ The Senators worried that this would compromise the independence of the Commissioner, who would be in debt to government for his appointment. As a result, the Senate and the Commons Opposition feared that he would not criticize his friends in government.

The controversy surrounding this appointment says much about the role of the Senate and the House of Commons. It illustrates the power of the government, due mainly to party discipline and responsible government. The resistance of the

⁵ Canada, House of Commons, Debates 7 June 1990, 12436.

⁶ Canada, Senate, Debates 16 April 1991, 5625.

⁷ *Ibid.*, 5626.

Senators to approve the appointment illustrates the determination of the Upper House not simply to pass the government's wishes. Although the appointment was eventually endorsed, the Senators showed through the process of delay⁸ that they disagreed with the government's decision.

The Senators expressed their concerns that the appointment of Mr. Phillips could set a precedent in which the prime minister would disregard the Upper House and do whatever he wanted.⁹ The prime minister had ignored a political convention that all parties agree on the nominee for the position of Privacy Commissioner.¹⁰ Refusing to rush to support the appointment of Mr. Phillips was one way for the Senate to exercise a form of power, which was to refuse to be disregarded by a government-controlled House of Commons.

The Senators feared that this appointment would have several other consequences that could weaken the power of the Senate. In addition to being in disagreement with the strong partisan ties of Mr. Phillips, the Senate also objected to the appointment because neither the Senate nor the Opposition in the House of Commons had been consulted. According to political scientist Paul Thomas, the precedent was to recommend a candidate that "commanded as wide respect as possible."¹¹ There was anxiety that if the government appointed one Officer of Parliament without consulting the Houses of Parliament, then the trend would grow.

⁸ The members of the Standing Senate Committee on Legal and Constitutional Affairs were accused by Honourable Senator Lowell Murray of "refusing" to report on their decision to decide on the proposed appointment of Mr. Phillips. If the committee refused to report, it was assumed that "the resolution would die at prorogation and the government would have to retrace its steps in the House of Commons and would have to start all over again." To this it, Honourable Senator Royce Frith replied, "and do it right this time."

Canada, Senate, Debates 15 April 1991, 5614.

⁹ Canada, Senate, Debates 16 April 1991, 5626.

¹⁰ Canada, Senate, Proceedings of the Standing Committee on Legal and Constitutional Affairs, 25 March 1991, 30:6.

¹¹ *Ibid.*, 30:10.

As a result, government would continue to push through appointments of the Officers of Parliament, notwithstanding opposition in the House or in the Senate.

Appearing before the Senate's Committee on Legal and Constitutional Affairs, Paul Thomas explains that the Senate's approval of an individual nominated for a position as an Officer of Parliament is an important part of the independence and legitimacy of Officers of Parliament. He states:

It is a generally-shared value within the parliamentary system for these officers that they have widespread respect across all party lines in the House of Commons and the Senate. I do not think that the drafters of the legislation intended that a whipped up majority in the House of Commons, followed by an automatic consent in the Senate, would endow these officers with the kind of authority that they need.¹²

The Senate's role is important in the appointment process because it acts as a balance to the partisan House of Commons. The Senate is a place where decisions made in the House of Commons are reviewed and evaluated, in theory, away from strict party discipline. This idea is reflected in the Senators' concerns over the "acceptability of appointments."¹³ In the case of the appointment of Bruce Phillips, the problem was not with the qualifications of Mr. Phillips to act as Privacy Commissioner but rather with the appropriateness and acceptability of his nomination. No one doubted that he had the skills to act as Privacy Commissioner; many questioned his close ties with the Conservative Party and resented the government's nomination of a candidate without the consent of Parliament. Although this debate occurred during a time when different parties controlled the Senate and the House of Commons, it should not overshadow the Senate's concern for the acceptability of appointments of Officers of Parliament.

¹² Ibid., 30:12

¹³ Ibid., 30:13

The methods of appointment and removal, and the reporting procedures of the Officers of Parliament, are important features that mould the relationship between the House of Commons and the Senate. The reporting procedure of the Auditor General is a good example: this official is required to report only to the House of Commons, although the report is usually tabled in the Senate as well. The fact that the Auditor General is obliged to report only to the House of Commons has been raised several times in the Senate.¹⁴ The Senators maintain that the fact the Auditor General is not legislated to report to them undermines the Senate as an equal part of a bicameral Parliament. Regarding the legislation that dictates that the Auditor General report only to the House of Commons, the Honourable Gilas Molgat had this to say:

That immediately drew my attention, and I assume that I will be told that this is an anomaly in the act and that the act states that the Auditor General must report to the House of Commons. If it is an anomaly in the act, I think it is high time that we corrected that anomaly. I see absolutely no reason why the Auditor General in some way reports what this house does to the House of Commons. We are *not* subservient to that house, nor should we be in any way. If that is to be the system, then we ought to insist that similar reports on the House of Commons be made to this house. I would suggest that the Internal Economy committee investigate this matter, and if it is an anomaly in the act then let us correct it. It is an improper arrangement. These are two separate houses, each with its own constitutional provisions; one is *not* subservient to the other.¹⁵

When this issue was pursued in committee, the Senators were told by then Auditor General Denis Desautels (1991-2000) that when the legislation regarding the Auditor General was debated in 1977, the new legislation was adopted based on

¹⁴ The issue was first raised in the Senate by Senator William Benidickson in 1977 (Canada, Senate, Debates 11 July 1977, 1116-1117); again by Senator Jack Marshall in 1981 (Canada, Senate, Debates 9 December 1981, 3433-3442); and by Honourable Gildas L. Molgat, Deputy Leader of the Government in 1991 (Canada, Senate, Debates 16 December 1991, 830).

¹⁵ Canada, Senate, Debates 16 December 1991, 830. Author's emphasis.

“existing approaches and longstanding traditions that, in Canada at least, the Auditor General reports to the House of Commons . . . [I]t is also the same tradition in the U.K., where [the Auditor General’s] counterpart reports to the House of Commons.”¹⁶

The report of the Auditor General is often submitted to the Senate at the same time as it is deposited in the House of Commons. As Senator Frith explains, the issue concerns the fact that there is no “responsibility under the law” for the Auditor General to report to the Senate.¹⁷ One role of the Senate as a part of Parliament “is to act as a check on the government, as a body that the government must come to for approval for its actions. Therefore it would fit nicely into that tradition and all those principles if the reports were also made to the Senate.”¹⁸

The concern surrounding this problem touches on two important principles. First, the Senators do not like to have their role as Parliamentarians undermined. Senators, “even though [they] are not elected, [they] do have some responsibility as Parliamentarians.”¹⁹ The second principle relates to the tension between the two Houses of Parliament. As former Auditor General Mr. Desautels stated: “We took the position, on some advice, that at this point in time, our 1993 report was addressed to the House of Commons and the lock-up was for the House of Commons, its members and representatives. I know that from time to time there are tensions between the two Houses.”²⁰ According to the Senate, the fact that the Auditor General is only statutorily required to report to the confidence chamber undermines

¹⁶ Canada, Senate, Proceedings of the Standing Committee on National Finance 21 June 1994, 13:13.

¹⁷ Ibid., 13:14.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

its role as a House of Parliament and adds to the tension that exists between the upper and lower Houses.

The above quotations, as well as the issue regarding the Auditor General's reporting procedure, illustrate instances where the Senate feels as though it has taken a back seat to the House of Commons. As a number of Senators note, the Auditor General is a servant of Parliament, not just a servant of the House of Commons. Therefore, the Senate should not have to remind the Auditor General, the House of Commons, or itself that the Senate has legitimate reasons to oversee in the affairs of the Auditor General. Furthermore, these examples of the Auditor General's disregard of the Senate support the false supposition that the Senate is not equal to the House of Commons.

The relationship between the lower house and the Auditor General says much about the differences between the upper and lower chambers. The House of Commons tends to use the Auditor General as a political tool, whereas this practice is far less common in the Senate. This supports the argument that the Senate is removed, at least more so than the House of Commons, from partisan politics and government control.

The custom of using the Auditor General as a political tool is not one that is new. In the early part of the twentieth century, there were occasions where the Opposition in the House of Commons attacked the government for the late delivery of the Auditor General's annual reports.²¹ While much care is taken in pointing out that the Auditor General is not an Officer of Government but an Officer of "this House,"²² the Opposition has no problem blaming the tardiness of the Auditor's

²¹ For example see Canada, House of Commons, Debates 14 February 1901, 95-98; Canada, House of Commons, Debates 15 March 1921, 905-910.

²² For example see Canada, House of Commons, Debates 11 June 1895, 2409-2411; Canada, House of Commons, Debates 14 February 1901, 98.

reports on the government. One excuse the Opposition used was that it was the responsibility of the government to ensure that Parliament had what it needed in order to do its job properly.²³ The Opposition also faulted the government for members of government departments not completing reports on time, for the printer not printing the report soon enough,²⁴ and for the Auditor's office being understaffed.²⁵ In such instances, the government has maintained that because the Auditor is independent of government, it has no control over when the reports are delivered to the members of Parliament.

Although the accusations and concerns move beyond late reports, both sides of the House of Commons continually view the Auditor General as a political weapon. For instance, the government has found itself criticized for speaking out against the Auditor General. In 1970, the government was challenged by Progressive Conservative member Mr. Ged Baldwin, for allowing a confrontation with the Auditor General Maxwell Henderson (1960-1973) on the roles and responsibilities of the Auditor General to reach "acute, if not crisis, proportions."²⁶ When challenged, the government responded, "there is no confrontation between the government and the Auditor General."²⁷ The Opposition challenged the government, claiming that if they believed the Auditor General wrong about a position he had taken then they should introduce Parliamentary motions for his removal. Furthermore, if the government wished to confront the Auditor, then that should have been done before the Public Accounts Committee, because "it is unforgivable that the government should begin an attack on the Auditor General under the table to undermine and

²³ House of Commons, Debates 14 February 1901, 95-97.

²⁴ Ibid, 95-97.

²⁵ House of Commons, Debates 15 March 1921, 910.

²⁶ Canada, House of Commons, Debates, 15 April 1970, 5889.

²⁷ Ibid.

harass an officer of this House whose functions are of most basic importance to this country.”²⁸

A more recent example concerns the Auditor General’s report of December 2001. In this instance, both the Opposition and the Government used the report of the Auditor General as a way to gain political ground. While the Opposition enjoyed bringing attention to government mismanagement, Lucienne Robillard, then Treasury Board Minister, chose to cite the Auditor General’s praise for “government for implementing new program audit and evaluation policies in federal departments and agencies.”²⁹

The Auditor General is not the only Officer of Parliament that is used by the House of Commons as a political instrument. The Information and Privacy Commissioners also fall into this category. The Opposition saw the October 2000 appointment of Privacy Commissioner George Radwanski (2000-present) as merely a political appointment adding to “an inadequate process.”³⁰ According to NDP member Bill Blaikie, “this [appointment] is another missed opportunity. As far as I am concerned, this is another demonstration of the fact that the government and the Liberal Party are a hopeless case when it comes to democratic reform or doing anything that would enhance the perception and the power of parliament.”³¹

Again, the 2000 Annual Report of the Information Commissioner was used to illustrate the government’s “blatant contempt for the commissioner.”³² Among the accusations in the Information Commissioner’s report were the following:

For its part, the Privy Council Office (PCO) decided to resist and challenge almost all of the Commissioner’s investigative

²⁸ Canada, House of Commons, Debates 21 April 1970, 6110.

²⁹ Andrew McIntosh, “Ottawa grant programs still ‘undermanaged’,” National Post, 5 December 2001, A7.

³⁰ Canada, House of Commons, Debates 28 September 2000, 8769.

³¹ Ibid, 8769.

³² Canada, House of Commons, Debates 17 October 2000, 9114.

powers. To this end, officials of the PCO have ignored orders for the production of records; failed to fully comply with such orders, (in one case non-compliance persisted until after two Federal Court judges had ordered PCO to comply).³³

These allegations by the Information Commissioner led Bloc Québécois member Michel Gauthier to label the Liberal government a dictatorship: "The first requirement of a dictatorship is to control information and release only what it wants."³⁴

These examples suggest that Officers of Parliament are manipulated by the House of Commons for political reasons, whereas this is not usually the case in the Senate. Although the Senate may express its unease about the appointment of certain individuals because of their partisan ties, the Senate does not exploit Officers of Parliament for political gain. As a non-elected body, there is little political gain to be made. Here, at least, is one argument in favour of an appointed institution.

While the House of Commons will use Officers of Parliament for political gain, the Senate uses them as a way to gain information. The reason for the contrast is that partisan politics are the currency of the Lower Chamber; Upper Chamber members depend upon information for their influence. According to the Information Commissioner, there are instances when the Commissioner will ask, or will be asked, to appear before Committees of both Houses. In the case of the money laundering bill (Bill C-22 Improving Proceeds of Crime Act),³⁵ the Information Commissioner

³³ Ibid.

³⁴ Ibid., 9115.

³⁵ "Bill C-22 proposes to bolster Canada's anti-laundering efforts by making it mandatory for financial agencies to report information relating to certain types of transactions. The information would be sent to a central data-gathering and analysis body, the Financial Transactions Reporting and Analysis Centre of Canada. As well, the bill would authorize the release of information to both domestic and foreign law enforcement agencies, subject to restrictions set out in the bill and other legislation (including the *Privacy Act*). A third major aim of the bill is to establish, in association with Canada Customs and Revenue, a system of reporting large cross-border transactions." Royal Assent granted 29 June 2000 (2000, c.17)

asked to appear before both the Senate and the House of Commons. Mr. Reid appeared before the Senate Committee but was told by the House of Commons that there was no time for his presentation.³⁶

The House of Commons has the opportunity to use the Officers for the purposes of information, but rarely does. Both the Information and Privacy Commissioners were unhappy with the failure of the House of Commons committees to review the reports of the Commissioners.³⁷ Although the Senate does not ask the Officers to appear before them as “a matter of course,” they may ask an Officer to appear before them on special issues.³⁸

In addition to using Officers of Parliament for the purposes of information, Senators have also noted that Officers of Parliament constitute a tool Parliamentarians should use to enhance their role, which is increasingly constrained by government. As Senator Noël Kinsella states,

Privacy is not simply delegated to an officer of Parliament. We are not absolved of our role as parliamentarians to protect privacy. The commissioner is an officer of Parliament and does not replace Parliament. We maintain our responsibility and duty in the promotion and protection of the privacy rights of Canadians.³⁹

The examples illustrating how each House views and uses Officers of Parliament denote a difference in function between the chambers. What keeps reappearing throughout the examination of the relationship between the Officers and the Houses of Parliament is a difference in how each House uses the Officers of

www.parl.gc.ca/common/Bills_ls.asp?lang=E&Ses=36&Ses=2&ls=C22&source=Bills_House_Government#BACKGROUNDtxt

Retrieved 28 May 2002.

³⁶ John Reid, personal e-mail communication sent Thursday 14 March 2002.

³⁷ See Privacy Commissioner of Canada, *Annual Report 1997-1998* (Ottawa: Minister of Supply and Services, 1998), 9-10; Canada, Senate, *Debates* 17 February 1999, 2637; John Reid, personal e-mail communication sent Tuesday 19 February 2002.

³⁸ John Reid, personal e-mail communication sent Friday 8 March 2002.

³⁹ Canada, House of Commons, *Debates* 5 October 2000, 2038.

Parliament. Because of the nature of the job, each House performs different and equally useful tasks. The Senate, because it is appointed, has the luxury of reviewing legislation without having to consider how the consequences may influence their success in the next election. Furthermore, the Senate, as a chamber of sober second thought, has the obligation to take more time in examination of new legislation. Because of the nature of the work conducted in the Senate, it has the time to do so.

The language used in the House of Commons regarding Officers of Parliament indicates the perception members of Parliament and the government hold of the Senate in Canada. For example, when discussing Officers of Parliament, the Senate is often left out of the equation. On many occasions in the House of Commons, it is emphasized that any particular Officer of Parliament is an Officer of *this* House.⁴⁰ Members of Parliament tend to ignore the role the Senate plays regarding Officers of Parliament and exclude the Senate as a part of Parliament. For instance, as mentioned earlier, the Auditor General is only legislated to report to the House of Commons. Often, members will make reference to the reports of the Auditor General stating that he or she reports to Parliament, when this really is not the case since the Auditor General reports only to the House of Commons.⁴¹

It may be the case that the term Parliament is being used as a synonym for the House of Commons, which is a frequent occurrence in political and colloquial usage. While this may appear to be an insignificant detail, it says much about the place of the Senate, and of the House of Commons for that matter, in Canadian politics. By using the term Parliament as a synonym for the House of Commons, it indicates a

⁴⁰ See for example, Canada, House of Commons, Debates 11 June 1895, 2410; Canada, House of Commons, Debates 14 February 1901, 98; Canada, House of Commons, Debates 26 June 1920, 4265-4266; Canada, House of Commons, Debates 4 June 1990, 12353; Canada, House of Commons, Debates 25 March 1994, 2810.

⁴¹ See for example, Canada, House of Commons, Debates, 15 March 1921, 904; Canada, House of Commons, Debates 29 June 1977, 7199; Canada, House of Commons, Debates 18 July 1988, 17688; Canada, House of Commons, Debates 25 March 1994, 2810; Canada, House of Commons, Debates 13 June 1994, 5188.

dismissal of the Senate. The constant reference to the House of Commons as Parliament leads to an incorrect association in the public mind and, even the minds of parliamentarians, that only the House of Commons constitutes Parliament. Moreover, it disregards the importance of the Senate in Canadian governance and perpetuates the erroneous assumption that the Senate is inefficient and inconsequential.

The perception of what the Senate does and the actual function of the Senate are not reflective of one another. As examples drawn from the Auditor General's work demonstrate, there has been a historic disregard for the function and usefulness of the Senate. The view that the Senate is simply a rubber stamp for the government is a mistaken idea that keeps reappearing despite continuous attempts of the Senate to show otherwise. The examination of the relationship between Officers of Parliament and the Senate and Officers of Parliament and the House of Commons reflects of the roles, dynamics and perception of the Houses of Parliament.

For example, the Senate's objection to the appointment of Bruce Phillips as Privacy Commissioner illustrates the independence the Senate has from the House of Commons, and the desire the Senate has to not be seen as a rubber stamp of the government. Although the appointment was eventually approved, the protest of the Senators indicated their disdain for the government's candidate for Privacy Commissioner and the government's indifference towards convention. It also showed that if the government chooses not to play by the rules, there is little the Members of Parliament in the House of Commons can do. The Senate, then, is left to act as a check on government, a role that is not successfully undertaken by the House of Commons.

The Senate also acts as a counterbalance to a very partisan and quite political House of Commons. That is not to insinuate that there is no partisan politics in the Senate, only that the Senate is less political, or political in a different way, than the House of Commons. While the House of Commons maneuvers Officers of Parliament to fit into their political attack on the other side, the Senate takes full advantage of the way Officers of Parliament can be used for information.

Finally, the way the Houses of Parliament interact with the Officers of Parliament serves to exemplify the misunderstood role of the Senate. Since the creation of the Auditor General, the Senate has had to remind Parliament that it has a legitimate role to play in issues dealing with the Auditor General, as the office is an Officer of *Parliament*, meaning an office that deals with both the House of Commons and the Senate. With the frequent exclusion of the Senate by the House of Commons, its little wonder why the role and importance of the Senate has been overlooked and misconstrued.

Conclusion

This thesis has shown the important role that Officers of Parliament play in Canada's system of government. The discussion in chapter one regarding responsible government argued that the theory of responsible government in the traditional sense was no longer applicable to the modern Canadian parliamentary system. Adaptations to the system had to be made if government was to continue to claim to function responsibly. One modification governments made was the introduction of Officers of Parliament. The creation of these independent servants meant that Parliament was assisted in their role of keeping the government accountable. Consequently, governments were able to claim they were accountable and responsible by reference to the Officers' audit and investigative function. As such, the independence of an Officer of Parliament has come to be one of the most important features in determining who is and who is not an Officer of Parliament. Without a significant degree of independence, Officers of Parliament would not be taken seriously as watchdogs of Parliament.

The contributions of Officers of Parliament to the governing process in Canada have been increasingly recognized by the Canadian public and the press. Controversies surrounding the allocation of government contracts such as the "Shawinigate" scandal in 2000-2001 and the Groupaction affair in 2002 have seen Canada's Officers of Parliament step out of the shadows and into the public spotlight. More proof that the involvement of Officers of Parliament in the Canadian parliamentary system has been increasingly recognized was the suggestion from the Senate following the events of September 11, 2001, that an Officer of Parliament

should be appointed to oversee the implementation of the Anti-terrorism legislation. Although the proposal was not adopted, it is important to note that an Officer of Parliament was recommended as a way to ensure public trust and confidence in a piece of legislation that made many Canadians fear unprecedented delegation of power to the executive would lead to unacceptable abuse of power as well.

More important still is the talk surrounding the need for an independent ethics commissioner. Following the failure by the Liberals to carry out their “Red Book” promises to appoint an independent Ethics Counsellor,¹ renewed debate, occasioned by unethical fundraising practices and the awarding of government contracts, has raised demands for an independent ethics commissioner along the lines of the traditional “five” Officers of Parliament. When the Prime Minister decided again against making the Ethics Counsellor an independent Officer of Parliament in May 2002, Progressive Conservative leader Joe Clark emphasized the importance of independent Officers of Parliament by stating that “the failure to have an independent ethics commissioner undermines the credibility of all other ethics initiatives.” Referring to Jean Chrétien’s failure to make the Ethics Counsellor independent from government, Clark asserted that the Prime Minister “can write the rules till the cows come home, but as long as he controls the cop, the rules are worthless.”²

The concern Mr. Clark expressed over the lack of independence of the Ethics Counsellor says much about Officers of Parliament. There is the idea that an independent Officer of Parliament somehow makes the rules worth something and

¹ Joël-Denis Bellavance, “Liberals Defeat Their Own Policy,” National Post 14 February 2001, A1.

² Andrew McIntosh, “Guide to Chrétien’s 8-point reform plan,” National Post 24 May 2002, A7.

assures Canadians that government is accountable and responsible. The credibility of Officers of Parliament lies in this independence.

Although Officers of Parliament receive little attention from the public and from the press, it is these bodies that people turn to when responsible government stumbles. The creation of the five Officers of Parliament was a response to particular problems in government. Whether it was poor financial management or the disastrous execution of elections, it was an Officer of Parliament that was appointed in order to assure Parliament, government, and the Canadian people that the same mistake would not happen again. After a number of reports that outlined unethical government activities, the attention of the press, the Opposition in the House of Commons, and the Canadian people has once again turned to Officers of Parliament. Praise for the Auditor General was heard in 2002 over her findings in the Groupaction affair; and the argument surfaced that Canada should have an ethics commissioner that belonged to Parliament and not to the Prime Minister.

Officers of Parliament have become a crucial aspect of responsible government. The relationship between the Parliament and its Officers illustrates this. The fierce debate concerning the appointment of questionable individuals for the task of an Officer of Parliament shows the determination of Parliament to keep its servants removed from government. The relationship between the Houses of Parliament and the Officers illustrates the important contribution Officers of Parliament make to the governing process. The five Officers assist the members in their work by assuming ombudsman-like responsibilities for language, information and privacy. In addition, the Officers provide information to both Houses of Parliament, although this bicameral function is sometimes ignored by the House of Commons. Finally, Officers of Parliament assure both the governors and the

governed that there is an independent body assuring accountability in government.

**FEDERAL OFFICERS OF PARLIAMENT
APPENDIX A**

Officers, Agencies And Commissions	Created	Statute	Appointment	Removal	Term	Reporting Procedure	Salary
Auditor General	1878	Auditor General Act (R.S.C., c. A- 17)	Governor in Council, by Commission under the Great Seal. Section 3(1) of the Auditor General Act	Governor in Council on address of the House of Commons and the Senate. Section 3(1) of the Auditor General Act.	10 years. Not eligible for reappointment. Mandatory Retirement 65. Section 3(2)(3) of the Auditor General Act.	Reports through Annual Report submitted to the Speaker of the House of Commons. Section 7(3) of the Auditor General Act.	Paid a salary of a puisne judge of the Supreme Court of Canada. Section 4(1) of the Auditor General Act.
Chief Electoral Officer	1920	Canada Elections Act (2000, c.9)	By resolution of the House of Commons. Section 13(1) of the Elections Act.	For cause by the Governor General on address of the Senate and House of Commons. Section 13(1) of the Elections Act.	Undefined. Mandatory retirement age 65. Section 13(2) of the Elections Act.	Reports through the Speaker of the House of Commons. Section 534(1) and 535 of the Elections Act.	Paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that court. Section 15(2) of the Elections Act.

FEDERAL OFFICERS OF PARLIAMENT

APPENDIX A

Officers, Agencies And Commissions	Created	Statute	Appointment	Removal	Term	Reporting Procedure	Salary
Official Languages Commissioner	1969	Official Languages Act. (R.S. 1985, c.31 4 th Supp)	Appointed by Commission under the Great Seal after approval of appointment by resolution of the Senate and House of Commons. Section 49(1) of the Official Languages Act.	By the Governor in Council at any time on address of the Senate and the House of Commons. Section 49(2) of the Official Languages Act.	7 years. On the expiration of a first or any subsequent term of office, is eligible to be re- appointed for a further term not exceeding seven years. Section 49(2)(3) of the Official Languages Act.	Reports through the Speaker of the House of Commons and through the Speaker of the Senate. Section 69(1) of the Official Languages Act.	Paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that Court. Section 50(2) of the Official Languages Act.

**FEDERAL OFFICERS OF PARLIAMENT
APPENDIX A**

Officers, Agencies And Commissions	Created	Statute	Appointment	Removal	Term	Reporting Procedure	Salary
Information Commissioner	1983.	Access to Information Act. (R.S.C. 1985, c.A-1)	Governor in Council under the Great Seal, after approval of the appointment by resolution of the Senate and the House of Commons. Section 54(1) of the Information Act.	By the Governor in Council at any time on address of the Senate and House of Commons. Section 54(2) of the Information Act.	7 years. On the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years. Section 54(3) of the Information Act.	Reports through the Speaker of the Senate and through the Speaker of the House of Commons. Section 40(1) of the Information Act.	Paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that Court. Section 55(2) of the Information Act.

**FEDERAL OFFICERS OF PARLIAMENT
APPENDIX A**

Officers, Agencies And Commissions	Created	Statute	Appointment	Removal	Term	Reporting Procedure	Salary
Privacy Commissioner	1983.	Privacy Act. (R.S. 1985, c.P-21)	Governor in Council, by Commission under the Great Seal, after approval of the appointment by resolution of the Senate and House of Commons. Section 53(1) of the Privacy Act.	By the Governor in Council at any time on address of the Senate and House of Commons. Section 53(2) of the Privacy Act.	7 years. On the expiration of a first or any subsequent term of office, is eligible to be re- appointed for a further term not exceeding seven years. Section 53(2)(3) of the Privacy Act.	Reports through the Speaker of the Senate and through the Speaker of the House of Commons. Section 40(1) of the Privacy Act.	Paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice or the Associate Chief Justice of that Court. Section 54(2) of the Privacy Act.

HISTORY APPENDIX B

Auditors General of Canada

(Reverse chronological order)

Shelia Fraser 2001-Present

Shelia Fraser (Interim) 2001

Denis Desautels 1991-2001

Kenneth Dye 1981-1991

Michael Rayner (Interim) 1980-1981

James Macdonell 1973-1980

Andrew Maxwell Henderson 1960-1973

Robert Watson Sellar 1940-1959

Georges Gonthier 1924-1939

Edward Davenport Sutherland 1919-1923

John Fraser 1905-1919

John McDougall 1878-1905

Chief Electoral Officers of Canada

(Reverse chronological order)

Jean-Pierre Kingsley 1990-Present

Jean-Marc Hamel 1966-1990

Nelson Jules Castonguay 1949-1966

Jules Castonguay 1927-1949

Oliver Mowat Biggar 1920-1927

Commissioners of Official Languages

(Reverse chronological order)

Dyane Adam 1999-Present

Victor Goldbloom 1991-1999

D'Ilbervill Fortier 1984-1991

Maxwell Yalden 1977-1984

Keith Spicer 1970-1977

Information Commissioners

(Reverse chronological order)

John Reid 1998-present

John Grace 1990-1998

Inger Hansen 1983-1990

Privacy Commissioners

(Reverse chronological order)

George Radwanski 2000-Present

Bruce Phillips 1991-2000

John Grace 1983-1990

**STATUTES
APPENDIX C**

Access to Information Act R.S. 1985, c.A-1
Auditor General Act R.S.C. c.A-17, 1995, c. 43
Canada Elections Act 2000, c.9
Official Languages Act R.S. 1985, c.31 (4th Supp)
Privacy Act R.S. 1985, c.P-21

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